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Supreme Court, U.S.
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No. :

In the

Supreme Court of the United States

WAYNE RITCHIE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent,

-and-

ROBERT V. LASHBROOK, in his individual and in his official capacities; IKE FELDMAN, in his individual and official capacities,

Defendants.

PETITION FOR A WRIT OF CERTIORARI

SIDNEY BENDER
Counsel of Record
LEVENTRITT LEWITTES & BENDER
Attorneys for Petitioner
1010 Northern Boulevard, Suite 208
Great Neck, New York 11021
(516) 336-2539

November 2009

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED

1. Should this Court exercise its supervisory powers and reverse this shocking departure from the usual course of judicial proceedings where the lower courts tolerated the Central Intelligence Agency's ("CIA") and Drug Enforcement Agency's ("DEA") "deliberately planned and carefully executed scheme" to practice a fraud on the court by deliberately filing a false answer, a false declaration, suborning perjury, and knowingly citing the perjury to the court and thereby entitle petitioner to the preclusive sanction of striking the government's answer under the authority of *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 245-246 (1944)?

2. Did the Ninth Circuit err in denying the petitioner's motion under Rule 60(b)(6) to set aside the Ninth Circuit's affirmance--based on fraud on the court facts-without any factual or legal analysis whatsoever where the government deliberately defaulted in not contesting that motion?

3. Did the Ninth Circuit err in refusing to consider the most compelling, undisputed evidence of fraud on the court in affirming the award of costs?

4. a. Does the Ninth Circuit have the power to effectively rewrite Rule 52 (c) of the Federal Rules of Civil Procedure by eliminating the explicit text "as a matter of law" after the word "judgment" in violation of this Court's holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) that the federal courts are not free to amend a rule outside the process Congress ordered?

b. Does the text "judgment as a matter of law" in Rule 52(c) for a bench trial- -like that same text in Rule 50(a) for a jury trial- -require that all reasonable inferences be given to the nonmoving party?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully petitions for a Writ of Certiorari to review the August 20, 2009 judgment, the June 24, 2009 order and the June 26, 2006 judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit memorandum entered on August 20, 2009 unanimously affirmed the award of costs to the respondent. 1a.[1]

The Ninth Circuit order entered on June 24, 2009 unanimously denied petitioner's "Motion under Rule 60(b)(6)" to set aside the panel's June 26, 2006 opinion, after respondent's default, and without any factual or legal analysis. 14a.

The Ninth Circuit opinion entered on June 26, 2006 unanimously affirmed the grant of respondent's Rule 52 (c) motion for judgment as a matter of law at the close of petitioner's case in chief under Federal Tort Claims Act, 28 U.S.C. §2674. 42a. 451 F. 3d 1019 (9th Cir. 2006). A petition for rehearing and en banc were denied on October 18, 2006. 60a. Certiorari was denied (127 S. Ct. 1337 (2007).

On July 5, 2005, the United States District Court for the Northern District of California, San Francisco Division, entered a final judgment pursuant to Federal Rules of Civil Procedure, 52 (c) granting the government's motion for judgment as a

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[1] Reference to the Appendix are to "__a". Emphasis supplied throughout unless otherwise noted.

matter of law and entered findings of fact and conclusions of law. 61a.

On January 5, 2005, the district court granted sanctions under Rule 30(d)(3) against AUSA Kenney and the respondent for obstructing Ritchie's lawyer's second deposition of Feldman and awarded Ritchie his attorney fees and costs for the second Feldman deposition.[2] 119a. However, the court denied petitioner's principal request for preclusive sanctions - - to strike respondent's answer for practicing multiple frauds on the court. 91a-92a, 119a. The sanctions motion was based on the court's finding that the government had filed false answers in denying that Feldman was involved in the CIA's MKULTRA program. US Attorney Robert Mueller ("USA Mueller")[3] filed those false answers. The answers' false denial of Feldman's involvement became the central theme of the defense. The district court also found that Feldman had repeatedly lied during his first deposition and into the early part of the second deposition in denying his involvement in MKULTRA as that central theme continued.

On May 24, 2004, the district court denied both parties' motions for summary judgment, finding that there were genuine issues to be tried. 157a. The district court found, *inter alia*, that Ira Feldman and George White were engaged in the involuntary

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[2] Petitioner waived the monetary award in order to have a final, appealable judgment.

[3] USA Mueller represented both the government and Feldman. The Assistant U.S. Attorney was Patricia Kenney ("AUSA Kenney"). Of counsel were Kathleen A. McGinn, Esq. ("McGinn") an Associate General Counsel for the CIA and Ellen Harrison, Esq., Office of General Counsel for the DEA.

drugging of unwitting subjects in San Francisco on behalf of the CIA under its MKULTRA project. 93a.

On July 1, 2002, the district court denied respondent's motion to dismiss or in the alternative for summary judgment. On July 12, 2001 the lower court dismissed the *Bivens* claims against Ike Feldman and Robert Lashbrook under California's one year statute of limitations.

On April 5 through April 8, 2005 petitioner presented its case in chief in a bench trial. Respondent's motion for a judgment as a matter of law under Rule 52 (c) was granted by an oral opinion on April 8 and a written opinion, after briefing, on partial findings of fact and conclusions of law on July 5, 2005. The district court refused to give any reasonable inferences to petitioner under Rule 52(c) for a "judgment as a matter of law" and instead gave a conclusive favorable, but unreasonable, inference to the government that won the case for it.

On August 3, 2007, the district court denied petitioner's motion to compel production of documents and denied a review of costs-taxed by the clerk for $14,204.62- based on respondent's bad faith misconduct.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1). Subject matter jurisdiction in the district court was based on 28 U.S.C. §1331, for claims under the Federal Tort Claims Act, 28 U.S.C. §2674, §2680 (k) et seq.

STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Federal Tort Claims Act, 28 U.S.C. §2674, in pertinent part, is set forth in the Appendix, 276a.

Federal Rule 50(a) of Civil Procedure entitled Judgment as a Matter of Law in Jury Trials... is set forth in, the Appendix, 276a.

Federal Rule 52 of Civil Procedure entitled Findings by the Court; Judgment on Partial Findings

(a) Effect

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Federal Rule 52 (c)'s predecessor, Rule 41 (b) is set forth in the Appendix, 278 a.

Federal Rule 60 of Civil Procedure entitled Relief From Judgment or Order is set forth in the Appendix, 279a.

STATEMENT

It is undisputed that from 1955, the Central Intelligence Agency ("CIA") was engaged in the testing of LSD and other psychoactive drugs on unwitting subjects in a safe-house, at bars and other places where people normally eat and drink in San Francisco. 62a. The CIA subproject was specially geared to drugging victims with LSD without their knowledge or consent. That operation was known as Subproject 42 and was under the supervision of George White, who was the director of the Federal Bureau of Narcotics ("FBN") in San Francisco. Ira Feldman was a group supervisor under White at the FBN and carried out LSD druggings under White's direction on behalf of the CIA. Wayne R. Ritchie, the

petitioner and a deputy U.S. Marshal at the time, claims that he became one of the unwitting victims of this bizarre government program when a federal narcotics agent slipped some LSD into his drink at a Christmas party in the Post Office Building in San Francisco on December 20, 1957.

After consuming some food and drinks at the party, Ritchie had classic symptoms of LSD and ultimately retrieved his two guns and attempted to hold up the Shady Grove Bar. He was knocked unconscious, arrested, spent the night in jail and resigned from the Marshal's service. He was subsequently given a suspended sentence. Ritchie was never told he was drugged. In 1999, when reading the obituary of the CIA's Dr. Sidney Gottlieb, Ritchie learned of the CIA's LSD dosing of hundreds of Americans and it suddenly came to him that was what had happened to him over forty years earlier. That analysis was later confirmed when he read the December 20, 1957 entry in George White's diary referring to "home flu-xmas party fed bldg press room". 275a. Ritchie concluded that that was the party at which he was drugged. Armed with his new knowledge, he timely filed his administrative claim with the CIA and DEA (formerly Federal Bureau of Narcotics) and after denial, timely brought suit under the Federal Tort Claims Act.

Ritchie had a four-day bench trial before the Honorable Marilyn Hall Patel, commencing on April 5, 2005. The parties stipulated for the trial that Ritchie "suffered a brief psychotic episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove Bar" (174a, No. 18).

Plaintiff's case-in-chief consisted of live testimony from Ritchie and his psychiatric expert, Dr. James S. Ketchum. Ritchie also relied principally on the deposition testimony of Ira Feldman, the central witness in the case and other evidence.

After plaintiff's case-in-chief, the defendant moved for judgment as a matter of law under Rule 52(c). The district court directed that a judgment be entered dismissing the case as a matter of law and made findings of fact and conclusions of law pursuant to Rule 52 (c) on the ground that Ritchie did not prove by a preponderance of evidence that someone administered LSD to him, that a federal agent administered LSD to him or that LSD caused Ritchie to rob the Shady Grove Bar.

A. Ira Feldman's Deposition Testimony

Feldman testified at his second deposition on February 7, 2003 (220a-223a):

Q. Now, all these people that *you personally drugged*, you never did any follow-up on them, in the sense of telling them *that you had drugged them*, did you?

* * *

A. Not all the people that *I drugged*. I drugged guys involved in about ten, twelve, period. I didn't do any follow-up, period, because it wasn't a very good thing to go say "How do you feel today?". You don't give them a tip. You just back away and let them worry, *like this nitwit, Ritchie.*

Q. When you say "let them worry," you mean let them have a *head full of LSD*...

A. Let them have a *full head [of LSD] like what happened, like what happened with this nut [Ritchie]* when he got out and got drunk.

* * *

Feldman then testified about negotiating with White on White's choice of intended victims.

Q. So you have a distinct recollection of doing that negotiation?

A. Oh, absolutely I have a recollection.

Q. And you negotiated with White and you said "Maybe not this guy. Let's do it to this guy"?

A. Same thing, right. Absolutely.

Q. So you were in on the decision process.

A. Of course I was in on the decision process.

Q. So you were essentially deciding who was going to suffer and who was not going to suffer.

A. I didn't say anybody had suffered. I didn't say anybody suffered. *The bird, like this guy [Ritchie], who saw snakes coming out, he deserved to suffer...*

B. District Court's Pre-Trial Findings

In its Memorandum & Orders (entered May 24, 2004 and January 5, 2005), the district court found (124a, 91a):

Ritchie's actions on the night of December 20, 1957, were completely out of character. "Feldman appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge and consent. Feldman gives this indication three times, though each reference is somewhat oblique". First: as to the guys that he personally drugged, Feldman "didn't do any follow-up", you "don't give them a tip. *You just back away and let them worry like this nitwit, Ritchie.*" Feldman "appeared to inculpate

himself in Ritchie's drugging a second time" when he testified "Let them have a full head [of LSD], like what happened, like what happened *with this nut when he got out and got drunk."* Id. Feldman was asked "if he were essentially 'deciding who was going to suffer', and implicitly referenced Ritchie a third time, replying that 'I didn't say anybody had suffered. *The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone.*'" (original emphasis).

The district court further found: "Ira Feldman, the admitted CIA operative and one-time MKULTRA participant, stands at the very center of this case...On multiple separate occasions during his first and second depositions Feldman denied- under direct questioning- that he had participated in any drugging of Ritchie, or indeed that he had ever before seen or interacted with Ritchie. However, during his first deposition Feldman denied *ever administering drugs to unwitting [subjects],* a denial that Feldman himself and others have since convincingly refuted... Like the thirteenth chime of a broken clock, the demonstrably incorrect statements in Feldman's first and second deposition cast doubt upon all those that preceded them. However, Feldman's denials at the beginning of his second deposition are no more equivocal. At the beginning of Feldman's second deposition, plaintiff's counsel showed Feldman a transcript of an interview that Feldman had given in which he admitted to having administered LSD to numerous non consenting individuals... Confronted with this evidence, Feldman lacked a compelling reason *to continue to*

lie about his involvement with MKULTRA and could hardly perpetuate his denials with any semblance of credibility."

* * *

"Each of plaintiff's various allegations of fraud on the court ultimately traces back to the contradictory and *apparently perjured testimony of Ira Feldman*. As noted above, Feldman's testimony at his first and second depositions was rife with contractions concerning his involvement in Project MKULTRA... These mutually inconsistent statements provide ample evidence to support plaintiff's assertion *that Feldman lied under oath.*" 101a.

C. THE CIA AND DEA FILED FALSE ANSWERS THAT WERE THE DEFENSE'S CENTERPIECE

The district court (Patel, J.) found that the government's answer and amended answer ("answers") on USA Mueller's masthead were in "fact, false" in *denying* that Feldman was "involved in the planning and/or execution of the CIA's MKULTRA program" (235a.).

D. THE CIA AND DEA KNEW THAT FELDMAN WAS INVOLVED IN THE CIA'S MKULTRA PROGRAM AND KNEW THEIR ANSWERS WERE FALSE

The issue here is did the government knowingly file "false" answers. That issue was not discussed in the Ninth Circuit's merits opinion.

The evidence conclusively proves that the CIA and DEA knew that Feldman was involved in the CIA's MKULTRA program and that they knowingly filed false answers.

The government's knowledge that Feldman was involved in the CIA's program is established by what the CIA and DEA knew about Feldman's involvement even before this litigation commenced:

1. Their knowledge came from Allen Dulles, the Director of the CIA, and Harry Anslinger, the Commissioner of the FBN, who together met with White and Feldman in San Francisco-- because of their successful drugging operation-- for the purpose of planning the LSD drugging of Fidel Castro of Cuba. 226a.-230a.

2. The District Court found:

> The most important evidence, and the only direct indication that he may have been drugged is the deposition testimony of Ira Feldman, a supervising group head at the Federal Bureau of Narcotics (FBN), who worked under George White and Dr. Sidney Gottlieb (another CIA employee) on the MKULTRA project. 132a

3. Their knowledge was also derived from John Gittinger, who had effectively replaced Dr. Sidney Gottlieb as the CIA supervisor of White's operation in San Francisco, who knew that in 1959 Feldman participated in planning the CIA's LSD drugging of Ruth Kelley (an entertainer), that Feldman was present at her drugging and that Feldman did a follow up of her for Gittinger and reported back to him. 199a-201a.

4. The CIA had a copy of George White's diaries in its possession which it reviewed prior to the commencement of this litigation. 236a, 239a-240a, 249a-250a, 254a-275a. Those White diaries prove Feldman's involvement with Gittinger and Gottlieb of the CIA regarding LSD on their supervisory visits to San Francisco.

5. After the Church Committee Report in 1976, the White diaries surfaced and that triggered the Kennedy hearings in 1977. As a result of the hearings on August 3, 1977, the CIA was tasked to identify and inform MKULTRA test subjects who may have been given drugs without their permission between 1952 and 1963. The investigation was conducted by the CIA's Frank Laubinger and a DEA investigator from about March 1, 1979 through September 29, 1979. The purpose of the investigation was *not* to identify persons who may have drugged others or to assign blame. The Laubinger memorandum, dated October 1979, described George White's Diary as representing a "major find" and described George White, alias Morgan Hall, as the key figure in the unwitting testing efforts with LSD. 249a.

6. The White diaries prove that Harry J. Anslinger, deceased, former Commissioner, FBN, was knowledgeable of White's collaboration with the CIA from the beginning. On November 21, 1952, the White diary has an entry: "call Anslinger re CIA, etc". 250a.

7. On September 7, 1977, an article appeared in the San Jose Mercury News entitled, "Secret CIA diaries surface in Los Altos" describing the diaries of George White, disclosing his actions-and those of

other CIA agents believed to have conducted experiments with mind altering drugs in the 1950's and 1960's. 252a-253a.

8. In 1998 AUSA representing the CIA in *Kronisch v. United States* in the Southern District of New York, forwarded a copy of George White's diary for 1953 to the attorney for the plaintiff. 248a.

9. On three separate days, there were entries in White's diaries connecting Feldman with John Gittinger of the CIA:

(a) For May 25, 1956- the entry was "w/Gittinger. Torie & Hamilton to Sahara Sands re Stormy- ("Ike"). 258a. Feldman testified "Stormy" referred to "LSD." 230a.

(b) September 25, 1957- the entry was "Gittinger arrives 5:30 met by Ike- to Pad. etc." 268a and

(c) September 26, 1957- the entry was "Ike at pad w Gittinger et al" 269a.

Therefore, the CIA and FBN knew Feldman was involved with MKULTRA.[4]

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[4] It is significant that on the oral argument on the costs appeal the government's attorney misrepresented the content of the cited White diary entries by stating: "The notations that at most say that Mr. White had meetings with Mr. Feldman, which is not surprising since he was his "boss." 12a.
In fact, the entries show meetings between Feldman and Gittinger re LSD.

E. BEFORE THE AMENDED ANSWER CONTAINING THE SAME FALSE DENIAL ABOUT FELDMAN WAS FILED AND WHILE USA MUELLER WAS IN OFFICE, THE GOVERNMENT'S KNOWLEGDE ABOUT FELDMAN'S INVOLVEMENT IN THE CIA'S PROGRAM IS ALSO CLEARLY ESTABLISHED

1. In the Joint Case Management Statement filed by both parties in this case on May 9. 2001, it was stated:

(i) After White died, CIA and DEA personnel reviewed his papers in 1978-1979. 236a.

(ii) Plaintiff's Initial Disclosure forwarded to AUSA Kenney stated: "8. An interview of Ike Feldman as shown on the program Mind Control Murder- first aired on "Investigative Reports" by A&E on September 22. 1999- in which Feldman stated that the CIA believed it had a truth serum in LSD and: *"[w]e tested these drugs* in bars, in restaurants, in so-called massage parlors, any place there was a drink and people were eating and drinking thats where the stuff was tested". 236a, 192a.

(iii) Defendant's Initial Disclosure listed "Diary of former FBN Agent George H. White. Location: Foothill Electronics Museum of the Perham Foundation, Foothills Community College, Los Altos, California." 239a.

2. Plaintiff's Third Supplemental Initial Disclosure, submitted copies of pages of White's

diaries that were so identified during the years 1955 through 1958. 239a-241a, 254a-275a.

The George White diaries establish that the CIA knew about Feldman's involvement in the LSD drugging under White before this action commenced. The additional proof from John Marks' book[5], the 1999 A&E video of an interview of Ike Feldman and the interview of Feldman for the Spin Magazine article in 1994 take on special significance as they confirm the other evidence establishing that Feldman was involved in the CIA's MKULTRA project. 202a-206a.

It is also telling during this same time frame that AUSA Kenney (with McGinn, listed as "Of Counsel") in Defendant's Initial Disclosures under Rule 26 (a)(1) of the Federal Rules of Civil Procedure listing "Potential Witnesses with Discoverable Information" terminally failed to list John Gittinger of the CIA. Obviously, John Gittinger, knowing about Feldman's planning, actual presence and follow up in connection with the CIA's drugging of Ruth Kelley in 1959 could- and did- expose the false denials about Feldman's involvement in the answers.

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[5] The Second Circuit in *Kronisch v. United States, et. al.* credited John Marks in footnote 8, it held:

John Marks was a former Senate aide and State Department official whose book, "The Search for the Manchurian Candidate," based on thousands of pages of CIA documents obtained through the FOIA, gave a detailed description of the CIA drug- testing programs. The documents reviewed by Corren in 1981 were apparently the ones originally made public pursuant to Marks FOIA request.

F. PROOF OF THE CIA'S ACTIVE CONCEALMENT OF FELDMAN'S INVOLVEMENT

McGinn's Declaration as Associate General Counsel for the CIA - - filed before Feldman's deposition 242a-247a- - stated:

> The purpose of this declaration is to identify individuals whose testimony would reasonably be expected to bear directly on plaintiff Ritchie's claims in this litigation and who also could have provided information which could lead to the discovery of other witnesses or evidence bearing on plaintiff's claims.

That McGinn Declaration named 10 individuals- dead and living- but significantly omitted Feldman's name. That was no oversight. That was a continuation of the same lie in the false answers and Feldman's Declaration. It is also persuasive evidence that McGinn- - one of two attorneys preparing Feldman - - was going to suborn Feldman to lie about his MKULTRA involvement in his deposition five months later.

G. THE DISTRICT COURT FOUND THAT FELDMAN REPEATEDLY LIED; AUSA KENNEY AND McGINN SUBORNED HIS PERJURY

The central theme of Feldman's false denial in the answers and in his Declaration in the year 2001 continued on July 30, 2002 during Feldman's first deposition. The district court found that Feldman repeatedly lied in that deposition and the beginning of his second deposition on February 7, 2003 in

denying that he personally administered drugs to unwitting subjects, "a denial that Feldman himself and others have since convincingly refuted" 140a. The district court further found that Feldman's contradictory testimony about his involvement with Project MKULTRA "provide ample evidence to support plaintiff's assertion that Feldman lied under oath." 101a. AUSA Kenney and the CIA's McGinn in preparing Feldman for his first deposition expressly implemented the basic scheme to have Feldman deny his participation in the CIA program. Proof of knowledge about the falsity of Feldman's denial meets the district court's legal standard for suborning perjury, namely, that Ritchie had to show that the government attorneys- - prior to Feldman's deposition- -knew that Feldman was going to lie.

The Ninth Circuit opinion failed to discuss Ritchie's first claim that the government knowingly filed false answers. It only discussed Ritchie's second claim that the "government's presentation of, and reliance on, what it knew was perjured testimony (that of Feldman)." 55a. Significantly that issue emphasized whether the "government" knew it was presenting perjured testimony of Feldman. But then the Ninth Circuit shifted the issue to whether the *"lawyer* representing the government" had knowingly presented perjured testimony.

After being confronted with his taped interview on his second deposition, Feldman confessed to personally drugging Ritchie with LSD. The Ninth Circuit found that Feldman made a "series of incriminating...statements" which referred to Feldman's personal drugging of "this nitwit, Ritchie" who had a "full head of [LSD]... like what

happened, like what happened with this nut" ___a. Feldman's testimony supported Ritchie's position that Feldman did, in fact, drug Ritchie with LSD.[6] Feldman's testimony was plain English. The Ninth Circuit effectively found that Feldman made a series of "*incriminating*" statements and thereby reversed the district court's characterization as "oblique."

Here the CIA, the DEA, Feldman and the government's attorneys acted in concert in having the answers falsely deny Feldman's involvement in the CIA program.[7] That concerted action was the government's sword in practicing the multiple frauds on the court.

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[6] The Ninth Circuit, on the merits, in footnote 9 stated:

This is a troubling case. Ritchie filed suit over four decades after the events in question, and long after memories had grown stale, witnesses had died and potentially relevant files had been destroyed. Despite that, Ritchie has persevered for many years to vindicate his name, and to find some measure of peace with the events of December 20, 1957.

Although we affirm the judgment against Ritchie, we think it is quite possible that everything Ritchie says happened did happen- that Ritchie was drugged, the district court's finding that he has not proved it is not clearly erroneous. Yet we know some people were drugged; the government admits as much. Ritchie's allegations of Cold War drugging by the CIA may thus be true, even though he could not prove them to the satisfaction of the district court. If Ritchie's claims are indeed true, he has paid a terrible price in the name of national security.

[7] After Feldman changed his testimony on his second deposition and admitted that he was involved in the CIA's LSD drugging project and that he personally drugged individuals, including Ritchie, Feldman and AUSA Kenney never corrected his lies on his deposition.

H. WHERE THE GOVERNMENT KNEW THAT FELDMAN'S TESTIMONY IN HIS DEPOSITION AND DECLARATION WAS PERJURIOUS, NONETHELESS THE GOVERNMENT CITED IT ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT

The government and its attorneys cited and relied upon Feldman's lies in his deposition that he had never personally drugged anyone with LSD and Feldman's false Declaration - -knowing they were false- - in its November 7, 2003 opposition to petitioner's motion for summary judgment and in support of its own motion for summary judgment. That was another fraud on the court. 158a-168a

REASONS FOR GRANTING THE PETITION

I. This Court Must Exercise Its Supervisory Powers And Reverse This Shocking Departure From The Usual Course Of Judicial Proceedings Where The Lower Courts Have Tolerated The CIA's, DEA's And Justice Department's Fraud On The Court And Effectively Placed Them Above The Law And Where The Justice Department Terminally Fails To Perform Its Traditional Function Of Enforcing The Law And Becomes The Wrongdoer By Deliberately Filing False Pleadings, By Suborning Perjured Testimony And By Knowingly Citing Perjured Testimony To The Court Under The Authority Of *Hazel- Atlas Glass Co., v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

The holding in *Hazel-Atlas*, 322 U.S. at 346 is tailor-made for the undisputed facts here:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely, it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies

> of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Here the agency of "public justice" is the United States Attorney for Northern District of California and that office-here, it originated with Robert Mueller who is now the Director of the Federal Bureau of Investigation ("FBI")- - who knowingly[8] filed an answer found to be false- - that provided the core theme of the fraudulent defense that followed the Justice Department from Washington D.C. also participated in the trial and appeals. The Office of General Counsel of the CIA and DEA also participated in this fraud on the court. Here these public institutions "set up to protect and safeguard the public" were not just "mute", they became the perpetrators of the "deception and fraud." Their misconduct was a direct assault on the "integrity of the judicial process."

The facts cannot in good conscience be challenged. The proof is overwhelming that the CIA and DEA knowingly filed a false answer denying Feldman's participation in the CIA's LSD drugging program entitled MKULTRA. That was the central premise from which all further fraud flowed. That same evidence proved that AUSA Kenney and the CIA's McGinn then suborned Feldman's perjury on his first deposition. It challenges reality to believe that USA Mueller was ignorant of the facts when Feldman's false and deceptive Declaration was prepared on his masthead. a. The government lawyers then knowingly cited Feldman's perjury in

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[8] USA Mueller was at least deliberately ignorant of the facts which is equivalent to knowledge, under *Wyle*.

his depositions and Declaration to the district court in opposition of motions for summary judgment. In short, those were multiple frauds on the court.

The Ninth Circuit on the merits never discussed petitioner's claim that the government deliberately filed a false answer. It overlooked Gittinger's (of the CIA) testimony that proved that Feldman participated in the planning of the CIA's drugging of Ruth Kelley, that Feldman was actually present during the drugging and then did a follow up of Kelley and reported on her condition back to Gittinger. That Gittinger undisputed testimony, by itself, demonstrated that the CIA knew in 1959 of Feldman's participation in MKULTRA. By not discussing that central theme of the knowledge of the fraud on the court that originated with the deliberate false answers, the Ninth Circuit committed reversible error in its short cut discussion of "knowledge" on the remainder of the various aspects of fraud on the court. The trial court and the Ninth Circuit overlooked Gittinger's undisputed testimony that conclusively demonstrated the CIA's knowledge of Feldman's participation in MKULTRA and thus that the CIA intentionally filed false answers and that AUSA Kenney and the CIA's McGinn, Esq. suborned Feldman's perjury. Under those circumstances the Ninth Circuit erred in holding that the government "was entitled to proceed on the assumption that Feldman has testified truthfully at his deposition." 56a. By clear and convincing evidence, the lawyers representing the government knowingly presented perjured testimony of Feldman and then cited it on the motions for

summary judgment, contrary to the Ninth Circuit. 158a-168a.

A. THE GOVERNMENT'S LAWYERS' DISHONESTY AND FRAUD ON THE COURT MUST NOT BE TOLERATED; IT CALLS FOR THIS COURT TO EXERCISE ITS SUPERVISORY POWER TO CORRECT THIS SHOCKING DEPARTURE BY THE JUSTICE DEPARTMENT, CIA AND DEA LAWYERS FROM ACCEPTED STANDARDS AS OFFICERS OF THE COURT

In *Kupferman v. Consolidated Research, & Manufacturing Corp.* 459 F. 2d 1072, 1078 (2d Cir. 1972), Judge Friendly stated:

> While an attorney should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from the standard in the conduct of a case he perpetrates a fraud upon the court.

Here, starting with USA Mueller and the lawyers in the Justice Department (AUSA Kenney and lawyers from Washington D.C.) and the CIA (McGinn) that have acted dishonestly and fraudently in this case, their misconduct must be exposed and cited for the prophylactic purpose of instructing the Bar, government and private. By overlooking obvious cited evidence, the lower courts have undermined our country's rule of law. Effectively, the lower

courts have placed the CIA, DEA and government lawyers above the law. That must not stand.

B. THE NINTH CIRCUIT'S TOLERANCE OF THE GOVERNMENT'S FRAUD ON THE COURT CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURT OF APPEALS.

A district court has "discretion" to order the extreme sanction of a default judgment under its inherent power for, *inter alia,* a "fraud on the court", deception or where a witness and attorney conspire to present perjured testimony. *Rozier v. Ford Motor Co.,* 572 F. 2d 1332, 1338.

The holding in *Aoude v. Mobil Oil.,* 892 F.2d 1115, 1118 (1st Cir. 1989) is directly applicable to the facts presented here:

> A *"fraud on the court"* occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in *motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim* or defense... It strikes us as elementary that a federal district court possesses the *inherent power* to deny the court's processes to one who defiles the judicial system by committing a fraud on the court.

The facts here fall squarely under that holding.

Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987) held that

fraud on the court may exist where witness and attorney conspire to present perjured testimony. *Rozier* (572 F. 2d 1338) held that fraud on the court exists where a party, with *counsel's collusions*, fabricates evidence. *Mas v. Coca Co.*, 163 F. 2d 505, 508 (4th Cir. 1947) held:

> It is sufficient to bar relief that plaintiff has been guilty of unconscionable conduct directly related to the cause of action, such as ... the *subornation of perjury* or other like attempt to perpetrate fraud upon the court....

C. The Court of Appeals *Sub Silentio* Approved The District Court's Erroneous Holding That Feldman's Perjury By Itself Cannot Be The Basis For Sanctions

Feldman was a client of the Justice Department and was found by the district court to be the "singularly salient source of evidence" in the case. 146a. In two separate opinions, the district court found that Feldman committed perjury. On sanctions, it held Feldman's testimony at his first and second depositions was rife with contradictions concerning his involvement in Project MK-ULTRA and "could hardly perpetrate his denials with any semblance of credibility." (140a, detailing Feldman's lies). Despite its finding of Feldman's repeated perjury on the most critical issues, the district court erroneously held as a matter of law that *perjury by itself cannot* be a basis for entry of default judgment against the United States. 103a

The petitioner asserted below that perjury "by itself' is the basis for the imposition of sanctions, citing *ABF Freight Systems, Inc., v. National Labor*

Relations Board, 510 U.S. 317, 324 (1994) ("Perjury should be severely sanctioned in appropriate cases") and *United States v. Mandujano*, 425 U.S. 564, 5776-578, 581-582 (1976) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings... [e]ffective restraints...are...imperative... [o]ur cases have consistently- indeed, without exception- allowed sanctions for false statements or perjury." The Court of Appeals failed to even mention petitioner's argument and *sub silentio* approved the district court's holding. That was certainly "an unseemly toleration of perjury in the course of adjudicative proceedings" by the lower courts here. *ABF Freight System, Inc.*, 510 U.S. at 327 (concurring opinion, Scalia, J.). Justice Scalia also stated that inaction with respect to perjury "undermines and dishonors the legal system- - undermines and dishonors the courts" (id. at 326).

The Ninth Circuit's "toleration" of Feldman's perjury must not be tolerated by this Court.

D. The Undisputed Evidence Established As A Matter Of Law That The Government Suborned Feldman's Perjury

The district court adopted an erroneous view of the law by holding that "nothing in Feldman's false testimony- *deliberately procured or otherwise*- 'threatens to interfere with the rightful decisions' of the instant case" and therefore the "entry of default judgment is not an appropriate remedy for any misconduct that may have been committed by the United States." 105a. That is not the law. Sanction

against the government must have teeth to be effective, otherwise it has an exclusive license to file false pleadings, to suborn perjury and practice a fraud on the court.

The district court further held that while it is undisputed that "portions of Feldman's testimony were indeed false...plaintiff must prove not only that [AUSA] Kenney presented testimony that was in fact false, but also that she knew that Feldman was committing perjury before his deposition were taken." 105a. Also, McGinn of the CIA prepared Feldman for his first deposition. A. prior to the commencement of this action, the undisputed evidence proved that Feldman was involved in the CIA's MKULTRA program and the CIA knew that. Since the CIA deliberately filed a false answer on denying Feldman's involvement, the CIA attorney, McGinn, as a matter of law is deemed to process that same knowledge. Thus, McGinn knew, prior to Feldman's deposition, that Feldman would tell the same lie in his deposition as was contained in the answers. As to AUSA Kenney, by the time of Feldman's first deposition on July 30, 2002, she had actual knowledge of Feldman's participation in the CIA's drugging program, *supra*. In any event her "deliberate ignorance constituted the equivalent of knowledge of the truth (one who is aware of a high probability of the existence of a fact but deliberately ignores the fact, is deemed to have knowledge of that fact)." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F. 2d. 585, 591 (9th Cir. 1983).

Before Feldman's first deposition, and certainly by his second, AUSA Kenney did know that Feldman as committing perjury. Even though Ira

Feldman's quoted statements in the *Spin* magazine article were unsworn, nonetheless, it was clear that Feldman was an active participant under George White in the CIA's San Francisco LSD drugging Program. 180a191-a.. Also, the book written by John Marks, *the CIA and Mind Control: The Search for the Manchurian Candidate,* was a highly reputed source of facts that established Feldman's involvement. 202a-206a.[9] Both were in AUSA Kenney's possession well before Feldman's first deposition on July 30, 2002. The Second Circuit credited John Marks as a reputable source (*supra*).

In addition, the district court failed to mention other evidence cited by petitioner. On May 8, 2001, petitioner's attorney sent AUSA a video entitled "Mind Control Murder" which was aired by A&E in 1999 and contained , inter alia, an interview of Ike Feldman stating that the CIA believed it had a truth serum in LSD and *"[w]e tested these drugs* in bars, in restaurants, in so-called massage parlors, any place there was a drink and people were eating and drinking that's where the stuff was tested". 148a.

Most important, the CIA is charged with the knowledge of its employee, John Gittinger, who knew from his personal knowledge that in 1959, Feldman participated in the detailed planning, was physically present at, and did a follow-up and reported to Gittinger on David Rhodes' (of CIA) LSD drugging of Ruth Kelley in San Francisco. 199a-1201a.

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[9] The Spin magazine article quoted Feldman as stating that the LSD was just the tip of the iceberg and "[t]hat's what I was doing when I worked for George White and the CIA."

The lower courts failed to even mention that cited Gittinger deposition. Also, well before the second deposition, AUSA had received a video from Ritchie's attorney of Richard Stratton's 1993 interview of Feldman in which Feldman stated "*I* would go to various bars, various massage parlors...*I* would give theses [LSD} drugs to certain people [m]ost of the times the LSD drug had very, very bad effect." 215a. Despite Kenney's knowledge before Feldman's second deposition, Feldman continued his lies in the early part of his second deposition. 140a.

Feldman admitted at his second deposition on more than one occasion that he personally drugged numerous individuals with LSD and in three separate answers that he personally drugged Ritchie with LSD. Later in that deposition AUSA suborned Feldman's perjury by having him deny that he personally gave LSD to anyone at a bar. 120a-122a Endnote 1 and 4. Initially, the district court found nothing improper in AUSA Feldman's denial, but in its findings of fact after trial, the district court found that it was "likely that [Feldman] did" personally drug persons with *LSD* at bars. 86a. Endnote 3. Clearly, Kenney suborned Feldman's perjury.

Feldman's first deposition also clearly and convincingly demonstrates that Kenney suborned Feldman's perjury in *Kenney's cross-examination.* In a leading question Kenney insisted that Feldman *"first heard* about the CIA and mind bending materials, such as LSD,... when that information was published in the *'70s* in connection with Congressional hearings?" Feldman gave Ms. Kenney the lie she suborned; he said "Yes. That's about the time". TR. 297-208. That was a blatant lie and know

by AUSA to be a lie at that time. Kenney had planned to elicit Feldman's perjury by discussing it with him "earlier [that] day. TR. 296.

Despite Feldman's obvious perjury and AUSA Kenney's suborning of that perjury during Feldman's first and second depositions, neither Kenney nor Feldman corrected the answers on both depositions.

E. Feldman's Declaration Was Effectively Suborned Perjury

Feldman gave false testimony in his August 1, 2001 Declaration that he did not recognize plaintiff's name, that he had no knowledge of anyone being drugged on December 20, 1957 and that he had no reason to believe that anyone associated with the Federal Bureau of Narcotics drugged anyone at a Christmas party at any time. 195a-196a.

Feldman's Declaration was on USA Mueller letterhead. Thus, Feldman's Declaration was suborned perjury. The Court of appeals approved, *sub silentio,* the district court's failure to even discuss that detailed evidence in support of suborning perjury.

F. Knowing That Feldman Committed Perjury In His Depositions and Declaration, AUSA Kenney and Respondent Cited It to The Court And Thus Practiced A Fraud On The Court

At the time of the government's opposition to petitioner's motion for partial summary judgment in November, 2003, respondent knew that Feldman's testimony in his Declaration and deposition were lies but nevertheless relied on it extensively and thus

practiced a fraud on the court. The Court of Appeals failed to discuss Ritchie's argument that the government's November 7, 2003 opposition (158a-168a) knowingly put forth clearly false testimony of Feldman that (i) Feldman does not recall knowing Ritchie, (ii) Feldman did not attend the Christmas Part on December 20, 1957, (iii) most importantly, that "Mr. Feldman did not slip plaintiff LSD" and (iv) the government explicitly relied upon Feldman's blatantly false Declaration August 1, 2001. 158a-160a.

The Ninth Circuit erred in not awarding preclusive sanction and striking the government's answer for its blatant bad faith misconduct- - in deliberately filing a false answer, in suborning perjury and practicing a fraud on the court- - established by clear, convincing and undisputed evidence combined with Feldman's perjury and AUSA's deliberate obstructed of Feldman's deposition as found by the district court

G. A Court's Inherent Power Allows It To Impose Sanctions Against The United States

Preclusive sanctions may be imposed under a. court's inherent powers. *Chambers v. Nasco,* 510 U.S. 32 (1991). Where the government has committed flagrant bad faith or willfulness-such as here- Rule 55(e) does not preclude the imposition of sanctions, especially at a later stage in the proceeding- as here- "which prevent[s] the government from presenting further evidence or otherwise augmenting the record." *Giampaoli v. Califano*, 628 F. 2d 1190, 119401196 (9th Cir. 1980).

Therefore, here, inasmuch as plaintiff has presented its evidence on liability and damages at trial, the appropriate sanction is the striking of defendant's answer and the entry of a monetary judgment.

II. THE NINTH CIRCUIT ERRED IN DENYING THE PETITIONER'S MOTION UNDER RULE 60(b)(6) TO SET ASIDE THE NINTH CIRCUIT'S AFFIRMATION ON THE MERITS WITHOUT ANY FACTUAL OR LEGAL ANALYSIS WHATSOEVER- - BASED ON FRAUD ON THE COURT FACTS - - WHERE THE GOVERNMENT DEFAULTED IN NOT CONTESTING THAT MOTION

After the briefing by both parties on the issue of costs on the second appeal, petitioner filed a "Motion Under Rule 60(b)(6) To Set Aside The Ninth Circuit's June 26, 2006 Affirmance of The July 5, 2005 Final Judgment." The government defaulted by not answering that motion. Inasmuch as petitioner set forth detailed facts proving that the (i) government knowingly filed false answers denying Feldman's involvement in the CIA's MKULTRA program, (ii) that the government attorneys- - before Feldman's first deposition- -knew he would falsely deny being involved in the CIA's LSD drugging program and therefore suborned his lies, (iii) that USA Mueller- - on his masthead- prepared a false Declaration that Feldman executed, knowing it was false and deceptive and (iv) government attorneys knowing the testimony in Feldman's deposition and Declaration was false, yet nonetheless, cited it to the

district court on the parties' motions for summary judgment, then for purposes of the Rule 60(b)(6) motion, the facts set forth must be deemed to be true where the government defaulted. It is telling that its order merely states that petitioner's motion "has been considered under case Nos. 05-16401 and 07-16753 and is denied" and makes no mention whatsoever of the government's default 14a. Under those circumstances, it was reversible error not to grant the motion.

Hammond Packing Company v. State of Arkansas, 212 U.S. 322, 352 (1909) held:

> for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the *rendering of a judgment by default, as if no answer had been filed.*

Therefore here, where the government fails to answer petitioner's Rule 60(b)(6) motion, the presumption is that respondent does not challenge the facts. Thus, since "no answer had been filed" here, the Ninth Circuit should have granted petitioner's motion by default and set aside its previous affirmance on the merits.

Where the government has committed flagrant bad faith or willfulness-such as here- Rule 55(e) does not preclude the imposition of sanctions especially at a later stage in the proceeding-as here- "which prevent[s] the government from presenting further evidence or otherwise augmenting the record." *Giampaoli v. California*, 628 F. 2d 1190, 1194-1196 (9th Cir. 1980).

III. THE NINTH CIRCUIT ERRED IN REFUSING TO CONSIDER THE MOST COMPELLING, UNDISPUTED EVIDENCE OF FRAUD ON THE COURT IN AFFIRMING THE AWARD OF COSTS

In addition to the evidence that was cited to the District Court for petitioner's sanctions motion- including Gittinger's (of the CIA) testimony that moved that in 1959 he knew that Feldman participated in the CIA's LSD drugging operation (Feldman helped plan, actually attended the CIA's LSD drugging of Ruth Kelley and did a follow up of her condition and reported it to Gittinger)- petitioner referred to further evidence in the record for the first time that proved that at the time they filed their answers denying that Feldman was involved in MKULTRA, the CIA and DEA knew that that denial about Feldman was false.

The evidence of fraud on the court is so important in preserving the integrity of judicial proceeding that it may be raised at any time and is not waived if not raised in the district court. Accordingly, the panel (different than the panel on the Rule 60(b)(6) motion) erred in refusing to consider the undisputed evidence of fraud on the court as though it was not an exception to the general rule. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 245-246 (1944).

Significantly petitioner's briefs and the oral argument on the costs appeal discussed all the evidence in the record that demonstrated beyond all doubt that the CIA and DEA knowingly filed false answers denying Feldman's involvement with the CIA's LSD drugging program. 5a-13a. It is telling

that on oral argument, respondents diary entries showing Feldman's meetings with Gittinger of the CIA relating to LSD(12a-13 a). AUSA stated that the entries "at most say that Mr. White had meetings with Mr. Feldman, which is not surprising since he was his boss." (11a-12a.) As demonstrated that was plain false.

The evidence of the government's fraud on the court required the Court of Appeals to reverse the award of costs of $14,204.62 to the government as an abuse of discretion under *Cooter & Gell v. Hartmarx v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

IV. The Ninth Circuit, In An *Ultra Vires Act*, Effectively Rewrote Rule 52(c) By Effectively Eliminating "As A Matter Of Law" After The Word "Judgment" From Its Text To Give It The Same Meaning As Its Predecessor, Rule 41(b), In Violation Of This Court's Holding In *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 620 (1997) That "Courts Are Not Free To Amend A Rule Outside The Process Congress Ordered"

Rule 52(c) of the Federal Rules of Civil Procedure, effective December 1, 1991, provides that in a bench trial where the court finds against a party on an issue upon which he has been fully heard, the court may enter a "judgment as a matter of law"against that party on a claim that requires a favorable finding on that issue. Significantly, Rule 41(b), Rule 52(c)'s predecessor, did not contain the text "as a matter of law" after the word "judgment."

Here, the Ninth Circuit, by not giving any meaning whatsoever to the phrase "judgment as a matter of law", effectively rewrote Rule 52(c). Indeed, to compound its error, the Ninth Circuit's decision is also inappropriately based on a 1990 decision--*ante* Rule 52(c)'s amendment on December 1, 1991--in *Lytel v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990) which construed the pre-existing Rule 41(b) as not requiring the grant of favorable inferences to the nonmoving party. 53a. n. 7. In sharp contrast, petitioner relies on the current Rule 52(c) with the explicit text "judgment as a matter of law" and this Court's 2000 decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), which defined the provision "judgment as a matter of law" under Rule 50(a) relating to jury trials as requiring the drawing of all reasonable inferences in favor of the nonmoving party.

The Ninth Circuit ignored petitioner's citation to *Reeves* even though it was decided after *Lytel* and after the 1991 amendment. *Reeves* held that "the standard for granting summary judgment mirrors the standard for *judgment as a matter of law*, such that 'the inquiry under each is the same'... in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw *all* reasonable inferences in favor of the nonmoving party..." *Reeves*, 530 U.S. at 150.

Here, the district court *sub silentio* denied Ritchie's claim that Rule 52(c) required that all reasonable inferences be drawn in favor of the nonmoving party. The Court of Appeals affirmed and acknowledged that its interpretation of the "phrase

'judgment as a matter of law' appears in both Rule 50(a) and Rule 52(c) [and] may be *confusing*, but it is not dispositive" and that "the standard for entering judgment as a matter of law differs under each of these rules." 53a, n. 7.

But the appeals court did not assign any importance to the fact that Rule 41(b) was replaced by Rule 52(c) with the added phrase "judgment as a matter of law." By not giving any meaning to that text the Ninth Circuit effectively eliminated "as a matter of law" from Rule 52(c). Thus, reliance on Rule 41(b) without the phrase "as a matter of law" in *Lytel* is irrelevant to the meaning of current Rule 52(c) with that phrase.

The Ninth Circuit recognized that the text "judgment as a matter of law" in Rule 50(a) for jury trials requires that all favorable inferences be given to the nonmoving party. 53a., n.7. But the Court of Appeals does not attempt to show why the standard for "judgment as a matter of law" in both Rule 50(a) and 52(c) should differ. Indeed, the advisory committee's note to the 1991 amendment of Rule 52 states "Subdivision (c) is added. It *parallels* the Revised Rule 50(a), but is applicable to non-jury trials." A side by side review of Rule 52(c) and Rule 50(a) demonstrates their essential sameness when it comes to "judgment as a matter of law", except that Rule 52(c) applies to a bench trial.[10]

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[10] In addition, Rule 52(c) requires that a "judgment shall be supported by findings of fact and conclusion of law as required by subdivision (a) of this rule." It is also noteworthy that by effectively eliminating "as a matter of law" from Rule 52(c), the Court of Appeals in substance made that rule very much like *Rule 52(a)*, which is applicable to bench trials after the close of all the evidence. Accordingly, inasmuch as the Ninth Circuit

It necessarily follows that this Court's rationale in *Reeves*, decided with reference to a "judgment as a matter of law" under Rule 50(a), applies equally to a motion for "judgment as a matter of law" under Rule 52(c) and requires that all reasonable inferences be given to the nonmoving party, Ritchie.

Obviously, it is beyond the powers of the Court of Appeals to exercise a choice of the old Rule 41(b) over the current Rule 52(c) under *Amchem*. Indeed, it was *ultra vires* for the Ninth Circuit to make such a choice because the "text of a rule... limits judicial inventiveness." *Amchem Products, Inc.*, 521 U.S. at 620. *Amchem Products, Inc., id.*, held: "Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commentators, the Judicial Conference, this Court, the Congress... The text of a rule thus proposed and reviewed *limits judicial inventiveness.* Courts are not free to *amend* a rule outside the process Congress ordered..." As this Court held: "of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are *bound to enforce.*" Id. Thus, the Ninth Circuit violated the holding of *Amchem Products, Inc., supra,* by effectively amending Rule 52(c)'s text by deletion of the phrase "as a matter of law".

Both lower courts erred in not giving all reasonable inferences to the nonmoving party,

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did not distinguish between a dismissal at the close of plaintiff's case in chief and a dismissal after both parties have submitted all of their evidence, it has subverted the purpose of Rule 52(c).

Ritchie, when they granted the government's motion for "judgment as a matter of law" under Rule 52(c). 36a. Once this Court holds that all reasonable inferences are required to be drawn in favor of the nonmoving party, Ritchie, under Rule 52(c), reversal is essential.

As is shown below, the overwhelming preponderance of evidence establishes that Feldman, a federal narcotics agent working for the CIA, administered LSD to petitioner Ritchie causing petitioner's brief psychotic episode that resulted in his attempted robbery of the Shady Grove Bar, *infra.*

A. Review Of A "Judgment As A Matter Of Law" Under Rule 52(c) Must Be *de novo;* It Was Error Of Law To Use The "Clearly Erroneous" Standard For Findings Of Fact Without Giving All Reasonable Inferences To The Nonmoving Party

Where the district court grants a motion for "judgment as a matter of law" as here, the Ninth Circuit requires a *de novo* review ("*Crow v. Wiltel Communications Systems,* 103 F.3d 1897, 1899 (9th Cir. 1996). The Ninth Circuit erroneously reviewed the district court's grant of a motion for "judgment as a matter of law" on partial findings of fact under Rule 52(c) as though review was limited to the "clearly erroneous" standard under Rule 52(a) at the end of the entire case. If that was so, then the advisory note would have stated 52(c) parallels 52(a). The note did not state that; it only stated that 52(c) parallels 50(a). Thus the Court of Appeals committed reversible error.

Even though Ritchie explicitly raised it in his main brief, the Court of Appeals erred in failing to discuss Ritchie's claim that the trial court erred in granting a *conclusive* evidentiary inference to the government that Feldman was not at the party and could not have drugged Ritchie solely from Ritchie's failure to place Feldman at the party. 77a-80a. "conclusively". *That conclusive, but unreasonably, inference was the sole support for the district court's finding that Feldman did not drug Ritchie. Because the court considered it conclusive, it was critical to the government's victory.* Also, the district court's finding that Feldman was not at the party: (i) squarely conflicts with its own acknowledgement that Feldman described "Ritchie's behavior on the evening of December 20", 80a; (ii) is in square conflict with the Court of Appeals' reference to Feldman's "series of incriminating" admissions of personally drugging petitioner who had a full head of LSD, (iii) conflicts with the requirement that all reasonable inferences be given to the nonmoving party, Ritchie, under Rule 52(c); (iv) conflicts with the right of petitioner to his entitlement to an adverse inference against the government for the CIA's intentional destruction of documents relating to its LSD druggings of unwitting victims (v) conflicts with the fact that the district court sanctioned the government and its attorney for deliberately interfering with and obstructing the petitioner's lawyer's deposition of the government's client and central witness, Feldman, when he appeared to be implicating himself in petitioner's drugging, and (vi) conflicts with the government's massive fraud on the court which should have

banned the district court from granting any favorable inferences to the government.

Thus, the district court stood justice on its head, by rewarding the government for all of its bad faith misconduct. That shocks the conscience.[11]

B. Petitioner Request That This Court Award Damages To Ritchie

The parties stipulated that if liability is established that the amount of economic damages that Ritchie suffered for past and future loss of earnings and retirement is $1,276,959. 175a.

Ritchie proved non-economic damages of $10,723,041 under the FTCA for negligent supervision, invasion of privacy and intentional infliction of emotional distress. Ritchie's real non-economic injury was demonstrated by Dr. Ketchum's testimony. Dr. Ketchum diagnosed Ritchie as having suffered from PTSD as a result of the unwitting drugging and devastating life altering consequences that resulted. Among many other symptoms and psychological injuries, Ritchie contemplated committing suicide immediately after the attempted

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[11] Feldman's incriminating admissions trumps the Ninth Circuit's unsupported speculation that "Feldman may have been lying to provoke defense (sic) counsel, trying to be funny, or simply speaking imprecisely when he made the purported admission." 51a. That observation is inconsistent with the context of Feldman's testimony- he was not provoking petitioner's counsel but responding truthfully when confronted with an audio tape of an interview and as the district court held "Feldman lacked a compelling reason *to continue to lie* about his involvement with MKULTRA and could hardly perpetrate his denials with any semblance of credibility". Feldman's statement that he was "in on the decision process" was not funny and was not imprecise.

hold up and approximately three times a week for the next six years. Ritchie, age 82, requests that this Court grant preclusive sanctions for the government's flagrant bad faith by striking its answer and awarding damages of $12,000,000.

After the LSD drugging by the government's agent in 1957, Ritchie did not learn what happened to him and his true injury until 42 years later in 1999. Ritchie respectfully requests justice in his lifetime, which is now. Final damages awarded him by this Court is appropriate justice.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
November 18, 2009

Respectfully submitted

SIDNEY BENDER*
Leventritt Lewittes & Bender
Attorneys for Petitioner
1010 Northern Boulevard, Suite 208
Great Neck, NY 11021
(516) 336-2539
*Attorney of Record

NOT FOR PUBLICATION*
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE A. RITCHIE,	:
Plaintiff-Appellant,	:
v.	:
	No. 07-16753
UNITED STATES OF AMERICA,	:
Defendant-Appellee.	:

MEMORANDUM

Filed: Aug. 20, 2009
Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
July 17, 2009- San Francisco, California

Before: SILVERMAN, CLIFTON, and M. SMITH,
Circuit Judges.

Having lost his action on the merits under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, Plaintiff-Appellant Wayne Ritchie seeks to reverse the district court's award of costs to Defendant-Appellee United States. Ritchie argues that the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir., R. 36-3

district court erred in denying his motion to deny costs to the government and in denying his motion for discovery of alleged documents containing proposed deposition questions and answers. As the for discovery of alleged documents containing proposed deposition questions and answers. As the facts and procedural history are familiar to the parties, we do not recite them here except as necessary to explain our disposition.

Generally, costs are awarded to the prevailing party. *See* Fed. R. Civ. P. 54(d) ("[C]osts-other than attorney's fees- should be allowed to the prevailing party."); *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 591 (9th Cir. 2000). However, we have found an award of costs to be an abuse of discretion in limited circumstances. See, *e.g.*., *Stanley v. Univ. of S. Cal.*, 178 F. 3d 1069, 1079-80 (9th Cir. 1999). Ritchie makes three arguments for why we should so find in this case.

1. The Government's Answer and Amended Answer

Ritchie first argues that the government engaged in misconduct by filing answers that it knew to be false. Specifically, he argues that, in light of various publicly available books and articles documenting the CIA'S MKULTRA program, the government must have known that Feldman was involved in the CIA drugging program. While deliberate ignorance can constitute knowledge, Ritchie fails to show by clear and convincing evidence that the government was deliberately ignorant or that it perpetrated a "fraud on the court." *See Phoceene Sous-Marine, S.A. v. U.S.*

Phosmarine, Inc., 682 F. 2d 802, 806 n.13 (9th Cir. 1982). In the previous appeal on the merits, we held that "[t]he district court's finding that Ritchie failed to prove by clear and convincing evidence that the government acted in bad faith in relying on Feldman's deposition testimony is supported by the record." *Ritchie v. United States*, 451 F. 3d 1019, 1026 (9th Cir. 2006) (citation omitted). This reasoning also controls here; the district court did not abuse its discretion in denying Ritchie's motion to review costs.

2. Feldman 's Second Deposition

In the trial on the merits, the district court penalized the government's deposition misconduct by requiring it to pay for the second deposition, a sanction that was upheld on appeal. Because the misconduct was not egregious and the government had previously been sanctioned, the district court had discretion to deny Ritchie's motion to review costs. *Ass'n of Mexican-American Educators*, 231 F. 3d at 592; *see also Richins v. Deere & Co.*, 229 F.R.D. 189,193 (D.N.M. 2004) (holding that denial of costs was inappropriate where the prevailing party had already been sanctioned for discovery abuses). The district court did not abuse that discretion.

3. Proposed Desposition Answers

Finally, the district court's decision to discount the story of the government attorneys' giving Feldman proposed deposition answers was not clearly erroneous. The two attorneys responsible for deposing Feldman submitted declarations denying giving Feldman proposed answers. *See United States v. Norwood*, 420 F. 3d 888, 895 (8th

Cir. 2005) (stating that the existence of documents is a question of fact, subject to review for clear error). AUSA Kenney also submitted personal records showing that she did not stay at the hotel where Ritchie alleges that the deposition preparation took place. In addition, Feldman later retracted the story.

As the allegation lacks evidentiary support, the district court did not abuse its discretion in denying Ritchie's motion for review of costs. *Cf. United States v. Abel*, 469 U.S. 45, 54 (1984). Thus, it was also not an abuse of discretion to deny the motion to compel discovery for documents which the district court determined likely did not exist. In addition, because Ritchie moved to compel prior to making a formal request for discovery, the district court was within its discretion to deny the motion based on Ritchie's failure to follow Federal Rule of Civil Procedure 37(a)(3)(B).

AFFIRMED.

ORAL ARGUMENT IN WAYNE A. RITCHIE V. UNITED STATES OF AMERICA ON JULY 17, 2009 (NO 07-16753) IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BEFORE: SILVERMAN, CLIFTON, AND M. SMITH, CIRCUIT JUDGES.

Bender: May it please the court, my name is Sidney Bender, and I'm appearing for the Appellant Wayne Ritchie. I would like to reserve two minutes for a reply.

Judge Silverman: You bet. Bender: Where the attorney for the CIA and the government engage in deliberate and repeated frauds on the court, the award of costs to the government is an abuse of discretion. In this particular case the District Court found that the government's answer was, in fact, false, by denying that Feldman participated in the planning, design and execution of the CIA's MK ULTRA project. Based on two sources...

Judge Smith: Excuse me Mr. Bender. My understanding of the record is that Ms. Kenny was sanctioned for interrupting Feldman's testimony and that that was the only proven instance of misconduct. Do I misunderstand the record?

Bender: Well, your honor, I am about to state to you that the reason why the government intentionally filed a false answer. The

District Court held that the answer was false. And there are two sources for that and that is the CIA had in its possession the White diary entries...

Judge Smith: Please. Let me stop you just for one second. So you're saying that my understanding about Ms. Kenny being the only proven instance of misconduct is wrong. Is that correct?

Bender: In terms of the proof I submit, that is correct. That it was not the only instance of misconduct.

Judge Smith: I understand you feel very strongly, and this is, I must confess, a most unusual case. But for purposes of our deliberations we have to go based on what the record shows and what the District Court found here. And the District Court I gather concededly found that there was one instance of misconduct. I know you alleged that there were other instances of misconduct but they have never been proven or accepted by the District Court, isn't that correct?

Bender: Well, I don't think that is correct because basically when you take the fact that the court found that Feldman lied in his deposition and that the answer that was false that was filed denying Feldman's participation was also false and the fact that the United States Government in connection with the motions for summary judgment knowingly submitted false

testimony from Feldman's deposition and to the court in opposition to our motion for summary judgment and support of its own, I submit to you.

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Judge Smith: Mr. Bender this case though, the District Court made a determination that the government didn't knowingly submit false answers.

Bender: Yes, that there was not enough evidence.

Judge Smith: Well again, what's the standard of review as we go on, it's abuse of discretion, isn't it?

Bender: Yes your honor but we have conclusive proof that I would like to give your Honor, I have stated in the brief that it cannot be contradicted to demonstrate that the U.S. Attorney's Office deliberately filed the false answer. And that was contained in the White diary entries which the CIA had before the commencement of the litigation that demonstrate that Feldman did in fact participate in the LSD drugging of people in San Francisco.

Judge Smith: Mr. [Bender,] you've got the wrong court here, we're a Court of Appeals. Your argument was already made and should be made to the District Court not to the Court of Appeals. We look at the record and the District Court made a determination in connection with what you have presented. The question here is whether there was an abuse of discretion. Where in the record can

you point that indicates that the District Court's determination was an abuse of discretion.

Bender: I'm telling you that now, your Honor. The fact, its undisputed fact that White's diary's entries...

Judge Smith: All the facts in this case are disputed, lets get that clear.

Bender: That's not so your honor. The government does not deny the fact that they had the White diaries prior to the commencement of this litigation and those diaries demonstrate that Feldman participated in the drugging of individuals on project MK ULTRA. In addition, John Gittinger of the CIA testified in this case, that he knows that Feldman participated in the CIA's drugging of Ruth Kelly in 1959 by planning, by attending the drugging, and by doing a follow up and then reporting to Mr. Gittinger of the results of the drugging. Now under those circumstances as a matter of law, Gittinger's knowledge which was obtained in 1959 must be attributable to the CIA. He was an employee, he supervised White's operation. Therefore, here you have undisputed evidence. Its in his deposition that not only in the White diaries but in Gittinger's testimony that the CIA knew before it filed that answer that it was indeed false. That Feldman had participated and that answer, that false answer, was then the centerpiece for the

entire defense because from that, next followed the Declaration of Feldman, E33-34 in the record, and that shows that the United States Government on the letterhead of the US Attorney Mueller prepared a false Declaration because he denied even knowing Ritichie. He denied that anyone ever drugged Ritchie. But he and the District Court acknowledged that Feldman described the behavior of Ritchie at the time of the party. So under those circumstances, I submit to your Honors on undisputed facts that they practiced a deliberate fraud on the court when that answer was filed. And that answer was not prepared by Feldman it was prepared by attorneys. It laid forth the entire scheme of what they were going to do and that took place in the Declaration which falsely denied any activity, it was misleading. It was filed in [the District] Court one year after it was made which was on August 1, 2001. The third thing, what then happened? The deposition of Feldman was taken. The first deposition, who prepared his deposition? It was Kenny, the assistant US Attorney and McGinn of the CIA. They knew all of those facts that I have laid out and yet they knew that Feldman was going to persist in the lie that he had given which was that he denied any participation in the MK ULTRA program. Under those circumstances, and that was the test that

the District Court laid out for us to prove that prior to the taking of the deposition those attorneys knew that he was going to testify falsely. The District Court found that Feldman repeatedly lied in his deposition, in his first deposition, and it was only when I confronted him in the second deposition with a series of audiotapes which showed what he had said in an interview that he finally opened up and stated, that he in fact personally drugged ten or twelve individuals and that he had personally given it to this nitwit Ritchie, my client, and furthermore that Ritchie had a full head of LSD at that time. Now the Court of Appeals, in the prior appeal, stated that this was a series of incriminating admissions, statements by Feldman. Under those circumstances, I submit to you that when the United States government submitted Feldman's deposition, which they knew was perjurious and they submitted that Declaration which was also false on the motions for summary judgment, it was practicing a fraud on the court and...

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Martikan: May it please the court. Morning your Honors, Owen Martikan for the United States. This appeal is about the standard of review, which was abuse of discretion. In its initial published opinion on the merits appeal of this case, this court found that the District Court did not abuse its discretion

when it decided that the discovery sanction it imposed was enough and that no additional sanctions warranted for any alleged or found misconduct on the United States part. That decision should hold here. There are only two additional facts or factual allegations that arise in this appeal that were not before the court last time. The first is this, frankly odd, luncheon meeting between Mr. Feldman and Mr. Ritchie's counsel. The District Court did not abuse its discretion when it looked at that and said well, Mr. Feldman's subsequent denial, which Mr. Ritchie's counsel admits, that he was he supposedly said he was given a script by government counsel. Government counsel's declaration is swearing that they did not do such a thing and Mr. Feldman's frank unbelievability as a witness did not-did not lend any credence to the allegation. The second factual allegations have to do with these so called George White diary entries that supposedly implicated Mr. Feldman in the CIA drugging. First of all, that argument was never raised before the District Court so this court is hearing it for the first time ever in this litigation. Second of all, the diaries, or at least the excerpts which Mr. Ritchie's counsel has attached here they prove no such thing. This is the date book of a dead man, the worst kind of hearsay. The notations that at most say that Mr. White

had meetings with Mr. Feldman, which is not surprising since he was his boss. But there is nothing here which would suggest that this court needs to do anything to disturb its previous holding published that the District Court did not abuse its discretion in awarding or penalizing the United States with any additional sanctions. As for the discovery issue, the District Court didn't abuse its discretion in refusing reopening discovery. It never of course was a request to reopen a discovery only a motion to compel and the District Court rightly found that the case should perhaps now, nine years along the pike, be laid to rest. I am willing to submit unless your honors have any additional questions.

Judge Silverman: Thank you Mr. Martikan. And Mr. Bender back to you, you have about a minute.

Bender: With respect to those diary entries, if the court would refer to page ten and eleven of my main brief. I have set forth three diary entries. One was for May 25, '56 the entry was "with Gittinger" and it refers to "Ike" [Feldman] in the same one re "Stormy." Feldman identifies "Stormy" as "LSD." Secondly, on September 25, 1957 the entry was, "Gittinger arrives 5:30 met by Ike [Feldman]-to the Pad". That was the safehouse where drugging and everything took place and other things. September 26, '57 the entry was "Ike at pad with

Gittinger" Gittinger was the liaison of the CIA who was supervising the very program we are talking about and for the government to and they knew of Gittinger's knowledge. They are charged as a matter of law with it because of the fact that he related the whole situation about Feldman in 1959 at the drugging that the CIA performed. Under those circumstances its undisputed that Feldman in fact did participate and just continued to lie and the government knew he was lying and submitted those lies to the court. Under those circumstances that is attorneys knowingly providing the court with false and perjurious testimony. Thank you very much.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE A. RITCHIE,	:	
Plaintiff-Appellant,	:	
v.	:	
		No. 05-16401
UNITED STATES OF AMERICA; et al.,	:	
Defendants-Appellees.	:	

WAYNE A. RITCHIE,	:	
Plaintiff-Appellant,	:	
v.	:	
		No. 07-16753
UNITED STATES OF AMERICA,	:	
Defendant-Appellee.	:	

ORDER
Filed June 24, 2009

Before: KOZINSKI, Chief Judge, B. FLETCHER and FISHER, Circuit Judges.

Appellant's November 21, 2009 "Motion under Rule 60(b)(6)" to set aside this panel's June 26,2006 opinion, *Ritchie v. United States*, 451 F. 3d 1019 (9th Cir. 2006) (case No. 05-16401), has been considered under case Nos. 05-16401 and 07-16753 and is denied.

The docket in case No. 05-16401 shall remain closed. No motions for reconsideration, rehearing,

clarification, stay of the mandate, or any other submissions shall be filled or entertained in this closed docket.

Case No. 07-16753 remains calendared for oral argument in San Francisco, California on July 17, 2009.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE RITCHIE,	:
Plaintiff-Appellant,	:
-against-	:
	:
UNITED STATES OF AMERICA	:
Defendants-Appellees.	:

Docket #07-16753

MOTION UNDER RULE 60(b)(6) TO SET ASIDE THIS COURT'S JUNE 26, 2006 AFFIRMANCE OF THE DISTRICT COURTS JULY 5, 2005 FINAL JUDGMENT

Plaintiff-Appellant moves this Court under Rule 60(b)(6) to set aside its June 26, 2006 affirmance (E225-233) of the district court's July 5, 2005 final judgment granting defendant's motion for judgment as a matter of law (E223), to reverse that July 5, 2005 judgment and to grant the preclusive sanctions of striking the government's answer and awarding Ritchie damages of $12 million.[1]

Rule 60(b)(6) motions may be made for "any other reason justifying relief from the operation of

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[1] References to appellant's main brief on this appeal are to "AB_".
References to the appellee government's brief are to "GB_". References to The Excerpts of Record are to "E_". Emphasis supplied throughout unless otherwise noted.

the judgment" which includes "to set aside a judgment for fraud upon the court." (Rule 60(b)). Our papers enumerate the multiple fraud on the court perpetrated by the government and its attorneys. Indeed, the massive instances of fraud on the court here exceeds that in the leading case of *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250 (1944).

On plaintiff's motion for sanctions, the district court held that in this Circuit, courts have the inherent power to enter a default judgment "when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice."(citing cases) (E186). The government's willful misconduct here falls squarely under that legal proposition and justifies the relief requested.

FACTS

Appellant's main brief on this appeal establishes that the CIA had possession of the George White diaries prior to the commencement of this litigation and that those diaries disclosed that Feldman was involved in the CIA's LSD druggings in San Francisco (AB 8-11). The government does not deny those facts.

The district court found that the government's answer and amended answer denying Feldman's involvement "are in fact false" (E 189, AB 11-12). Since the government - prior to the commencement of this action - knew that Feldman was involved in the CIA's LSD drugging, then it necessarily follows that the United States Attorney knew that the

denials in its answer and amended answer were false. Thus, the United States Attorney deliberately filed a false answer on March 2, 2001 (E 272) and thereafter, an amended answer. Since March 2001, the government has concealed the truth that it knew its answer was false and never corrected it in the district court and on the prior appeal in this Court. The government practiced a fraud on both courts.

The government does not deny the fact that it knew of Feldman's involvement in the CIA'S LSD druggings in San Francisco prior to the commencement of this lawsuit and therefore knew its answers were false. By not so denying, the government implicitly acknowledges that it knew its answers were false. The government's attorneys continue to violate their obligation as officers of this Court to make full and honest disclosure. Instead of admitting the truth, the government attorneys continue to actively conceal the facts and simply rely on the now discredited finding by the district court by arguing that the "district court **properly rejected for lack of evidence** that the United States knew that the denials in its answer or amended answer were false" (GB 14). Therefore, even though the government attorneys know that the evidence conclusively establishes that they knew their denials in the answers were false, the government is now arguing the plainly false proposition that the district court "properly rejected for lack of evidence" that the United States knew its denials were false. Accordingly, the government attorneys are once again practicing a fresh fraud on this Court.

The Supreme Court in *Shawkee Mfg. Co. v. Hartford-Empire Co.*, 322 U.S. 271, 273 (1944) held: "honest dealing with the Court required that Hartford should make a full disclosure of its fraudulent conspiracy. Its failure to do so under these circumstances aggravated the previous deception it had practiced on the Patent Office and the courts". Here, "honest dealing" with this Court require defendant and its attorneys to make a full disclosure of their "fraud on the Court" and collusion with Feldman to submit Feldman's lies and other misrepresentations to the district court and this Court.

The fact that prior to the commencement of this litigation, the CIA knew of Feldman's involvement with the CIA's LSD druggings in San Francisco also establishes that (i) the United States attorney prepared and filed Feldman's false and deceptive Declaration in the district court, (ii) AUSA Kenney and the CIA's Ms. McGinn knew from the facts that Feldman was going to commit perjury on his first deposition and therefore suborned perjury -- the district court found that Feldman repeatedly lied on his first deposition and at the beginning of his second deposition -- (iii) the government practiced a fraud on the court by citing Feldman's Declaration and the lies in his depositions in opposition to plaintiff's motion for summary judgment and in support of its motion for summary judgment knowing that they were false; and (iv) the district court sanctioned the government and AUSA Kenney for 'deliberately interfering with and obstructing appellant's attorney's second deposition of Feldman.

In view of the government's multiple bad faith misconduct which are in fact multiple frauds on the court, appellant requests this Court to set aside its June 26, 2006 affirmance of the district court's July 5, 2005 final judgment.

As the Advisory Committee Notes state with respect to motions under Rule 60(b)(6):

And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 1944, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250.

The government's massive bad faith misconduct here - and multiple frauds on the court - clearly justifies the relief requested.

ARGUMENT

I. THE GOVERNMENT'S BAD FAITH MISCONDUCT IS UNDISPUTED

A. The Government Does Not Deny The Conclusive Evidence That The George White Diaries - In Its Possession Prior To The Commencement Of This Case - Disclosed Ike Feldman's Involvement With The CIA'S LSD Druggings in San Francisco.

The undisputed evidence proved that the CIA had possession of the George White diaries prior to

the commencement of this case (AB 8-10). Also, it is undisputed that White's diaries disclosed Feldman's involvement with the CIA'S LSD druggings in San Francisco (AB 10-11).

B. The District Court Pound That The Government's Answers Were In Fact False; The Evidence Establishing That The United States Attorney Knowingly Filed A False Answer Is Undisputed; That Is A Fraud On The Court.

The district court found that the government's answer and amended answer denying Feldman's involvement in Project MKULTRA was false (AB 11-12, E189). Due to the government's undisputed knowledge (AB 8-11), it is therefore conclusive that the CIA and the United States Attorney knew that their answers falsely denied that Feldman was involved in the CIA'S LSD druggings in San Francisco. Thus, the government does not deny the fact that the United States Attorney deliberately filed a false answer and amended answer. That is a fraud on the court (AB 27-29).

Effectively, the government attorneys had actively concealed from the district court their knowledge that the answers were false. Based on the government attorneys concealment of their knowledge, the district court ruled that plaintiff failed to prove the necessary knowledge on the government's part (E 189).

Instead of admitting the truth, the government attorneys continue to actively conceal the facts and simply rely on the now discredited finding by the district court by arguing that the "district court **properly rejected for lack of evidence** that the United States knew that the denials in its answer or amended answer were false" (GB 14). Therefore, even though the government attorneys know that the evidence conclusively establishes that they knew their denials in the answers were false, they are now arguing to this Court the plainly false proposition that the district court "properly rejected for lack of evidence" that the United States knew its denials were false. Thus, the government attorneys are practicing a fresh fraud on this Court.

Appellee fails to respond to appellant's cite of *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) that a "fraud on the court requires a 'grave miscarriage of justice'". (AB 25-26). The government's deliberate filing of a false answer is a fraud on the court. Appellant demonstrated a "grave miscarriage of justice" here (AB 25-27).

The government for the first time on this appeal does not dispute the fact that its attorneys knowingly filed a false answer and practiced a fraud on the court. Thus, from the time the government filed its answer on March 2, 2001 (E272) to the present time, the government has concealed the truth that it knew its answer was false and never corrected it in the district court and in this Court on the prior appeal and thereby continued to defraud both courts.

The government now argues that appellant can not raise the government's deliberately filing a false answer for the first time on appeal, and cites *Connecticut General Life Insurance Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882-883 (9th Cir. 2003) (GB 14). That case is distinguishable; it held that because the party failed to request a bond in connection with the injunction in the district court, the Court of Appeals would not entertain that argument for the first time on appeal. But, the issue here is much more compelling because the appellee's argument requests this court to approve of the government's fraud on the court. That argument should be rejected as a matter of law. Also, the government's argument is not applicable against appellant's Rule 60(b)(6) motion.

Certainly, the government's concealment of the truth from the district court and this Court in obtaining a favorable ruling should never be a ground for refusing to consider the issue for the first time on appeal. Deception and lies are not the basis for judicial decisions. Indeed, they must be rejected. This court held: "[t]here is no point to a lawsuit, if it merely applies law to lies. True facts must be the foundation for any just result". *Valley Engineers Inc. v. Electric Engineering Co.*, 158 F. 3d 1051, 1056 (9th Cir. 1998). Accordingly, the rule against considering an issue for the first time on appeal should be trumped where the application of the rule would perpetuate the government's past fraud on the court and indeed carry out a fresh fraud on the court.

C. The Government Does Not Dispute Appellant's Conclusive Evidence That The United States Attorney Deliberately Prepared And Filed Feldman's False And Deceptive Declaration; That Is A Fraud On The Court

As a result of the government's undisputed knowledge, the United States Attorney's preparation of Feldman's false testimony in his Declaration constituted suborning of perjury (AB 12-14; AB 29-30).

The government's active concealment from the district court of its knowledge of the falsity of the answer and amended answer also extended to the government's concealment of its knowledge that Feldman's testimony in his Declaration was false and deceptive. Therefore, the United States Attorney in preparing Feldman's Declaration, knowing it was false and deceptive, suborned his perjury.

D. The Government Does Not Challenge The District Court's Finding That Feldman Repeatedly Lied On His Depositions And Does Not Dispute Appellant's Conclusive Evidence That AUSA Kenney Effectively Suborned Feldman's Perjury.

Defendant argues that the district court stated that appellant misrepresented the findings of

this Court (GB 14). Plaintiff cited to the district court this Court's finding that Mr. Feldman made a "series of incriminating ... statements" (E 227-228). In addition, plaintiff cited as support footnote 3 in this Court's opinion, which referred to Feldman's personal drugging of "this nitwit, Ritchie" who had a "full head of [LSD]" "like what happened, like what happened with this nut" (id., AB 13-14). Plaintiff did not misrepresent this Court's finding. Indeed, Feldman's testimony supported plaintiff's position that Feldman did drug Ritchie with LSD.

Inasmuch as the government does not challenge the fact that prior to the answers being filed, it had knowledge -- from White's diaries -- of Feldman's involvement with the CIA'S LSD druggings in San Francisco, then AUSA Kenney and Ms. McGinn of the CIA both knew that Feldman was going to commit perjury before his first deposition commenced (AB 14- 15) which is the legal standard used by the district court as a predicate for suborning perjury (E187). The district court found that Feldman repeatedly lied in his first deposition and the beginning of his second deposition (AB 14-15). Accordingly, AUSA Kenney suborned Feldman's perjury (AB 14-17).

As stated above, the law is not built on lies. The government's argument that the district court's findings on the merits - now discredited by undisputed facts actively concealed by the government - must be used on the award of costs is without merit against appellant's Rule 60(b)(6) motion (GB 13). That government argument would encourage a policy against correcting deception and

fraud on the court. It would work a manifest injustice on the facts here and reward the government for its active concealment of the truth from the district court and this Court. Thus, where disclosure of the truth is first conceded by the government on appeal, that necessarily trumps the law of the case. Therefore, *Planned Parenthood of Columbia/ Willamette, Inc. v. American Coalition of Life Activists*, 518 F.3d 1013, 1017 (9th Cir. 2008) (GB 13) does not apply to the facts here.

E. The Government Fails to Rebut Appellant's Conclusive Evidence That Feldman's Perjury In His Declaration And Depositions Were Cited By It To The District Court On The Parties' Motions For Summary Judgment Knowing They Were False And Thus Practiced A Fraud On The Court.

The government practiced a fraud on the court when it knowingly cited Feldman's lies in his depositions and Declaration in opposition to plaintiff's motion for summary judgment and in support of its motion for summary judgment (AB 17-18).

F. The Government Fails To Answer The District Court's Sanction Of The Government And AUSA Kenney For Deliberately Interfering With And Obstructing Appellant's Attorney's Second Deposition of Feldman.

In addition to all of the cited bad faith government misconduct, the district court sanctioned AUSA Kenney and the government for deliberately interfering with and obstructing plaintiffs attorney's second deposition of Feldman and found that the "most notable interruption" came when Feldman "appeared to be implicating himself in plaintiffs drugging" (AB 18-19). The district court's monetary sanction failed to correct the damage done to appellant's case by the government's and its attorneys deliberate misconduct. Under the circumstances, this misconduct should be added to the other bad faith misconduct in granting appellant's motion under Rule 60(b)(6) to set aside this Court's affirmance of the district court's July 5, 2005 judgment dismissing plaintiffs case as a matter of law.

II. UNDER ITS INHERENT POWER, THIS COURT SHOULD IMPOSE THE SANCTION OF STRIKING THE GOVERNMENT'S ANSWER AND AWARDING APPELLANT DAMAGES

Based on the government's deliberate bad faith, Rule 55(e) does not preclude the imposition of sanctions, especially at a later stage in the proceeding - as here - "which prevent [s] the government from presenting further evidence or otherwise augmenting the record." *Giampaoli v. Califano*, 628 F.2d 1190, 1194-1196 (9th Cir. 1980).

Therefore, here, inasmuch as plaintiff has presented its evidence on liability and damages at trial, the appropriate sanction is the striking of defendant's answer which would result in a judgment "on the merits and not a default judgment within the meaning of Rule 55(e)" (id.).

The parties stipulated that: "[p]laintiff suffered a brief psychotic episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove Bar" (E 144, No. 18, Excerpts of Record in 05-16401). That stipulation followed the district court's finding of that same fact (E88).

The parties have stipulated that if liability is established that the amount of economic damages that Ritchie suffered for past and future loss of earnings and retirement is $1,276,959 (E 141, Excerpts of Record in 05-16401).

Ritchie claims non-economic damages of $10,723,041 under the FTCA for negligent

supervision, invasion of privacy and intentional infliction of emotional distress.

Wayne Ritchie was a Marine, a guard at Alcatraz, a Deputy United States Marshal, and described as a decent, respectable man who was as straight as an arrow. Ritchie, without his knowledge, was given a "full head of LSD" which caused him to have a brief psychotic episode resulting in his attempt to hold up a bar. Ritchie's real non-economic injury was demonstrated by the report of Dr. James Ketchum, plaintiff's psychiatric expert. Here Ritchie had his brains scrambled in a manner that is difficult to fathom. Who at the age of thirty would sell their brain for the next six to forty- two years for $10.7 million?

Ritchie and Dr. Ketchum testified how Ritchie suffered tremendously. Among many other symptoms and psychological injuries, Ritchie contemplated committing suicide immediately after the attempted hold up and approximately three times a week for six years.

Ritchie, now age 81, requests that this Court now award him non-economic damages of $10,723,041 and economic damages of $1,276,959 for a total of $12,000,000.

Wherefore, plaintiff-appellant requests that this Court grant his motion in its entirety.

November 20, 2008

Respectfully submitted

LEVENTRITT LEWITTES & BENDER

By: _____

Sidney Bender

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WAYNE RITCHIE,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

No. C 00-3949 MHP

MEMORANDUM & ORDER
Re: Plaintiff's Motion to Compel Discovery and Review Taxation of Costs

Plaintiff Wayne Ritchie brought an action against the United States of America, alleging that the Central Intelligence Agency and the Bureau of Narcotics tested psychoactive drugs on unknowing and unwitting American citizens including plaintiff during the 1950s and that this nonconsensual testing drove plaintiff to commit an armed robbery on December 20, 1957. Plaintiff initially filed claims against the United States of America under the Federal Tort Claims Act, 28 U.S.C. §2671 et seq. ("FTCA"), and against Robert V. Lashbrook and Ira Feldman under the First, Fourth, Fifth, and Eighth Amendments to the United States Constitution. Plaintiff sought twelve million dollars in compensatory damages, as well as costs and attorney's fees. The court held a four-day bench trial on the FTCA claims and subsequently granted judgment in favor of defendant. Now before the court

is plaintiffs motion to compel documents and to review the clerk's taxation of costs.

BACKGROUND[1]

As explained in this court's July 1, 2002 Memorandum and Order, plaintiff, a former Deputy United States Marshal, alleges that he was unwittingly given food or drinks that were laced with lysergic acid diethylamide (LSD) or another psychoactive drug while he was attending a holiday party in the United States Post Office Building on December 20, 1957. Compl. ¶ 5. he drank a single bourbon and soda and returned to his office shortly thereafter. Id. Two hours later, Ritchie re-entered the party and consumed three or four more drinks. Id. at 6. Plaintiff then began to feel paranoid and imagined that his fellow officers and co-workers had turned against him. Id. at 7. He left work, returned home briefly, and then visited four bars, where he consumed a total of two more drinks. Id. at 7-9. Still fueled by paranoia, plaintiff then resolved to hold up a bar and returned to his office where he took two revolvers from his personal locker. Id. at 9-10. He entered a fifth bar, had one drink, and then drew a weapon and demanded money. Id. at 10. Someone knocked Ritchie unconscious, and he was subsequently arrested. Id. at 10-11.

Plaintiff alleges that he was a victim of a federal program, called "MKULTRA," dedicated to the research and development of drugs, including LSD, that might be used to alter human behavior. Comp. ¶¶ 18&26. Plaintiff maintains that he "first suspected that he might have been surreptitiously

drugged" when he read the obituary of Dr. [Sidney] Gottlieb, a former CIA agent implicated in that agency's mind-control program, in the newspaper on March 15, 1999. Comp. ¶ 23. He found additional support for his suspicion in April 1999 when he read a diary entry of George White, an agent of the Bureau of Narcotics and allegedly the operating head of the CIA's "mind-altering program" in San Francisco. See Comp. ¶ 24; Ritchie Dep., Exh. B-12 (White was a senior employee at the San Francisco Federal Narcotics Bureau in the 1950s). White's December 20, 1957, diary entry stated, in part, "xmas party Fed bldg Press Room." Ritchie Dep., Exh. D; Comp. ¶ 25.[2] White was an MKULTRA subcontractor from approximately 1953 until 1964. McGinn Dec. ¶ 5. In that role, he established a safehouse apartment in San Francisco where drug tests were conducted on drug informants and prostitutes. Id. Defendant has also produced an extensive record of newspaper and television coverage documenting federal mind-control experimentation. Id. Exhs. A-C (newspaper articles) & X (books).

After a number of pre-trial motions, the court conducted a bench trial. At trial, Ritchie presented two live witnesses during his case-in-chief: himself and a doctor who testified that LSD was the cause of Ritchie's attempted robbery. Ritchie also relied on the deposition testimony of Ira Feldman, a former agent involved with the MKULTRA program. After Ritchie concluded his case in chief, the government moved for judgment as a matter of law under

Federal Rule of Civil Procedure 52(c). The court granted the government's motion.

The allegations in the instant motion concern the deposition of Feldman on July 30, 2002. On May 8, 2007, long after the deposition and the conclusion of trial, plaintiffs counsel, Sidney Bender, took Feldman to lunch. During lunch, Feldman told Bender that shortly before the scheduled deposition two attorneys representing defendant- Kathleen McGinn, agency counsel for the Central Intelligence Agency, and Patricia Kenney, assistant United States Attorney- provided Feldman with a list of questions and proposed answers ("scripts") in preparation for the deposition. Bender also admits that Feldman retracted his statements about the scripts in subsequent conversations. Bender Dec. ¶ 2.

Plaintiff presented similar arguments in the context of the government's motion at the close of trial pursuant to Federal Rule of Civil Procedure 52(a). At that time, plaintiff sought sanctions against defendant arguing that defense counsel was aware of Feldman's perjurious testimony. The court sanctioned defendant pursuant to Rule 30(d)(3) because Kenney's behavior "may well have denied plaintiff the opportunity to solicit further valuable testimony." January 5, 2005 Order, at 15. The court awarded plaintiff reasonable costs and attorneys' fees incurred in taking Feldman's second deposition. That ruling was subsequently affirmed by the Ninth Circuit. Ritchie v. United States, 451 F.3d 1019, 1022 (9th Cir. 2006).

LEGAL STANDARD

Motion for Review of Taxation of Costs

An award of costs to a prevailing party is permitted as a matter of course under Federal Rule of Civil Procedure 54(d)(l).[3] An item is not recoverable as a cost under Rule 54 (d) unless it is specifically enumerated in 28 U.S.C. § 1920.[4] "[Section] 1920 defines the term 'costs' as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54 (d)." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-42 (1987). A court denying the prevailing party costs under rule 54(d)(l) must provide its reasons for doing so. Ass'n of Mexican-Am. Educators v. State of Cal., 231 F. 3d 572, 592-93 (9th Cir. 2000).

Northern District Civil Local Rule 54 sets out procedures for awarding costs and further delineates the types of costs taxable under Federal Rule of Civil Procedure 54(d). Civil Local Rule 54-3 (a)(l) allows for "the Clerk's filing fee" to be taxed "if paid by the claimant." Civil Local Rule 54-3(f) allows for taxing of fees for masters and receivers. No other allowances for any type of filing fee is made under Civil Local Rule 54. Federal Rule of Civil Procedure 54(d)(2)(a) provides that a claim for non-taxable costs related to attorney's fees can be made by motion.

DISCUSSION

Plaintiff seeks two forms of relief: first, he asks the court to compel the discovery of certain documents for the purposes of challenging the clerk's taxation of costs; second, he requests a review of the clerk's taxation of costs. The court will review each of these requests.

I. Motion to Counsel

Plaintiff seeks discovery of certain "scripts" he alleges that the government's attorneys prepared for defendant Ira Feldman in advance of his deposition. He contends that production of the documents may establish that defendant's attorneys knew that Feldman was likely to commit perjury before his deposition was taken.

Plaintiff moves pursuant to Federal Rule of Civil Procedure 34 of his requested discovery. Rule 34(a) states that:

> [a]ny party may serve on any other party a request (1) to produce and permit the party making the request or someone acting on the requestor's behalf to inspect, copy, test, or sample any designated documents or electronically stored information... which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. Fed. R. Civ. P. 34(a).

He also cites Federal Rule of Civil Procedure 45 governing subpoenas to support his request. Compelling discovery is inappropriate here because plaintiff has not made a formal discovery request

pursuant to Rule 34 or subpoena under Rule 45. Furthermore, plaintiff has not properly served either on defendant. Compelling discovery is available only after a formal request-via request or subpoena- had been rejected by a party. See Fed. R. Civ. P. 34(c), 45. In his reply, plaintiff contends that his motion to compel "could be considered a request for production of documents by a party to this action." Pl.'s Reply at 1. It is possible that plaintiff considers a motion to compel a proper request under Rule 34(c), but this court does not.

Second, defendant contends that there is no mechanism for discovery at this point in the litigation. Rule 54(d)(l) does not envision a discovery process as part of a request for review of taxation of costs. Fed. R. Civ. P. 54(d)(l) ("Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs..."). The text of the Rule is silent on whether discovery is permitted as part of the review of a bill of costs. While it may be unusual to seek post-trial discovery in challenging a bill of costs, it may be justified in extraordinary circumstances. This is not an extraordinary case such as to justify the discovery sought.

Finally, defendant states that it has no responsive documents to plaintiff's request. It contends that such a request is baseless and further alleges that plaintiffs counsel obtained information on the requested documents in a suspect manner. Plaintiff's counsel, defendant contends, contacted

Feldman without first contacting Feldman's counsel and probed Feldman with questions about privileged communications. Moreover, Feldman subsequently denied any admissions he made in conversations with counsel. Bender Dec. ¶ 2 ("In subsequent telephone calls Mr. Feldman reversed his admission and denied making the above statement.").

Defendant has submitted declarations from the two lawyers responsible for preparing Feldman for his deposition. Both attorneys deny giving Feldman scripts. Kenney Dec. ¶ 6, 8-14 ("I can state unequivocally that I have never given any witness, including Mr. Feldman, a written statement of 'proposed answers.' "); McGinn Dec. ¶ 5-6. Kenney also submits her personal records indicating that she did not stay at the hotel where plaintiff alleges that the deposition preparation took place. Kenney Dec. ¶ 11, 12, Exh. A. The court is satisfied that there are likely no responsive documents to plaintiff's request, were any such request properly made.

The motion to compel is DENIED.

II. Motion for Review of Taxation of Costs

Plaintiff seeks review of the clerk's taxation of costs in the about of $14,204.63 pursuant to Civil Local Rule 54-5. He argues that defendant's unclean bands resulting from deliberate acts of misconduct in regard to the Feldman deposition entitle him to a denial of all costs. See Association of Mexican-Am. Educators v. Calif., 231 F. 3d 572, 591 (9th Cir. 2000) (noting that the court may use its discretion to deny the award of costs to punish prevailing party misconduct).

Plaintiff argues that he is entitled to a reduction of costs because of an alleged contradiction between the Ninth Circuit and this court in the characterization of Feldman's deposition testimony. In reviewing this court's imposition of sanctions for the conduct of the government's counsel at Feldman's deposition, the Ninth Circuit described Feldman's deposition testimony as a "series of incriminating, contradictory, and combative statements about his role in the CIA'S LSD project." Ritchie v. United States, 451 F. 3d 1019, 1024 (9th Cir. 2006) (footnotes omitted). Plaintiff contends that this statement by the Ninth Circuit in describing the events at trial "effectively overruled this court's" conclusions that the Feldman's statements were oblique at best. Pl.'s Mot. At 6. Plaintiff is incorrect. The Ninth Circuit not only did not effectively overrule this court, it affirmed the court's conclusions about Feldman's testimony, albeit with some reservations:

> Although Feldman made a number of comments in his depositions suggesting that he was involved in drugging Ritchie, the district court's determination that Ritchie did not prove Feldman's involvement is not clearly erroneous.

Id. Plaintiff also bases his request for a reduction of costs on the fact that the court awarded him sanctions in the form of attorneys' fees for the second deposition. While the court is empowered to reduce or refuse to tax costs where there is misconduct, any misconduct here had been sanctioned previously. To reduce costs would serve only to doubly penalize

defendant. The fact that Ritchie waived the sanction in order to perfect his appeal is of no consequence.

Defendant notes that the clerk has already reduced its costs from $26,176.14 to $14,204.62. Plaintiff's spurious allegations against defense counsel, mischaracterization of the Ninth Circuit's findings, failure to properly serve defendant with a discovery request before filing a motion to compel discovery as well as his somewhat dubious conduct toward Feldman, a person of ailing health, suggest that plaintiff may well be the party deserving of sanctions. However, this case should find repose in finality and not rise up once more in post-trial, post-appeal reprises.

The motion for review of costs is DENIED.

CONCLUSION

Plaintiff's motion to compel production is DENIED and the motion for review of costs is DENIED.

IT IS SO ORDERED.

Dated: August 3, 2007

/S/
MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. All facts cited herein are taken from the Complaint unless otherwise noted.
2. The full entry reads: "home flu-xmas party Fed bldg Press Room." Ritchie Dep., Exh. D.
3. Federal Rule of Civil Procedure 54(d)(l) provides, in pertinent part Costs Other than Attorneys' Fees. Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs.
4. Sections 1920 provides

Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under § 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under § 1828 of this

title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE RITCHIE,	No. 05-16401
Plaintiff-Appellant,	D.C. No.
v.	CV-00-03940-MHP
UNITED STATES OF AMERICA; ROBERT V. LASHBROOK, in his individual and official capacities; IRA FELDMAN, in his individual and official capacities,	OPINION
Defendants-Appellees.	

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
May 18, 2006 - San Francisco, California

Filed June 26, 2006

Before: Betty B. Fletcher, Alex Kozinski and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Kozinski

COUNSEL

Sidney Bender, Leventritt Lewittes & Bender, New York, New York, for the plaintiff-appellant.

Owen P. Martikan, Assistant United States Attorney, San Francisco, California, for the defendants-appellees.

OPINION

KOZINSKI, Circuit Judge:

We consider what inferences a district judge may draw, during a bench trial, in deciding a motion for judgment based on partial findings under Federal Rule of Civil Procedure 52(c).

Facts

On December 20, 1957, Wayne Ritchie, then a Deputy United States Marshal, attended a lunch-time Christmas party at the United States Post Office Building[1] in San Francisco. Ritchie drank a bourbon and soda, and then returned to his desk. Later that afternoon, with the party now in full swing, Ritchie took a break to down three or four more bourbon and sodas. When he returned to his office, he began to feel paranoid and worthless.

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[1] NOW known as the James R Browning United States Courthouse.

Ritchie left work early and went home. There, an unpleasant conversation with his live-in girlfriend from New York, who complained about living in San Francisco, drove him to leave the apartment in favor of the Vagabond Bar. He drank two more bourbon and sodas; his feelings of restlessness and paranoia continued. After about half an hour, he left the bar and began walking back to his office. As he walked, Ritchie hatched a plan to rob a bar so he could buy his unhappy girlfriend a plane ticket home to New York. According to Ritchie, he fully expected to get caught; in his paranoid state, he figured that the robbery would be an act of self-destruction.

Ritchie retrieved two guns from his storage locker at work and set out to put his plan into action. He decided to target the Shady Grove Bar. Once there, Ritchie ordered another bourbon and soda. After finishing his drink, Ritchie went up to the bartender, pulled out a gun and demanded money. A waitress came up behind him and asked Ritchie what he was doing. When Ritchie turned around, someone knocked him unconscious.

Ritchie awoke with two officers standing over him. As a result of his attempted robbery, he resigned from the Marshal's Office, pled guilty to attempted armed robbery, paid a $500 fine and was sentenced to five years probation. Obviously, these were the days before sentencing guidelines.

Fast forward forty-two years. In 1999, Ritchie read the newspaper obituary of Sidney Gottlieb, a doctor at the Central Intelligence Agency. *See* Obituary, *S. Gottlieb, directed mind-control tests, San Jose Mercury News*, Mar. 11, 1999, at 7B. From this article, Ritchie learned that the CIA had been administering LSD to unwitting subjects in the 1950s as part of a Cold War project to study its effects.[2] *See generally Kronisch v. United States*, 150 F.3d 112, 116-19 (2d Cir. 1998) (describing the CIA'S drug-testing project). Based on this article, as well as his own independent research into the CIA'S drugging activity, Ritchie concluded that the CIA had drugged him as part of a mind-control experiment. Ritchie brought a timely suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, against the United States and its agents, claiming that his attempted robbery was set in motion when someone surreptitiously slipped LSD into his drinks at the 1957 Christmas party.

After denying the government's motion to dismiss, *Ritchie v. United States*, 210 F. Supp. 2d 1120, 1131 (N.D. Cal. 2002), and for summary judgment, the district court held a four-day bench trial. Ritchie presented two live witnesses during his case-in-chief: himself and a doctor who testified that LSD was the cause of Ritchie's attempted robbery of the Shady Grove. Ritchie also relied heavily on the

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[2] The government admits that the CIA secretly tested LSD on U.S. citizens during the 1950s and 60s. The government disputes, however, that Ritchie was one of its subjects.

deposition testimony of Ira "Ike" Feldman, a former agent involved with both the Federal Bureau of Narcotics and the CIA'S surreptitious LSD-doping project, who made a series of incriminating,[3] contradictory[4] and combative[5] statements about his role in the CIA'S LSD project.

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[3] [Ritchie's attorney:] Now, all these people that you personally drugged, you never did any follow-up on them, in the sense of telling them that you had drugged them, did you?

[Government attorney:] Objection. Lacks foundation. Go ahead and answer it, if you can.

[Feldman:] Not all the people that I drugged. I drugged guys involved in about ten, twelve, period. I didn't do any follow-up, period, because it wasn't a very good thing to go and say "How do you feel today?" You don't give them a tip. You just back away and let them worry, like this nitwit, Ritchie.

[Ritchie's attorney:] When you say "let them worry," you mean let them have a head full of LSD and let-

[Feldman:] Let them have a full head, like what happened, like what happened with this nut when he got out and got drunk.

[4] [Ritchie's attorney:] Mr. Feldman, did you ever witness anybody slipping LSD to another person?

[Feldman:] Never did.

[Ritchie's attorney:] Did you ever slip LSD to another person?

[Feldman:] Never did. Never did.

[5] [Ritchie's attorney:] And were there ever prostitutes that you gave [LSD] to to give to other people?

[Feldman:] I imagine there were. I don't remember what they were doing off times.

[Ritchie's attorney:] Didn't you have a great reputation as having a lot of whores?

At the close of Ritchie's case, the government moved for judgment as a matter of law, which the district court construed as a motion under Federal Rule of Civil Procedure 52(c) for judgment based on partial findings in a bench trial. The district court granted the government's motion, finding that (1) Ritchie had not proven that he was administered LSD by an agent of the federal government, or by anyone else, on December 20, 1957; and (2) Ritchie had therefore failed to prove that an *LSD-induced*[6] psychotic disorder caused his attempted robbery of the Shady Grove. The district court rejected Ritchie's arguments that he was entitled to a favorable evidentiary inference because the government destroyed files related to the CIA'S drugging activity and that he should be granted preclusive sanctions based on government misconduct during Feldman's depositions. Instead, the district court awarded Ritchie "reasonable costs and attorneys' fees" incurred in taking Feldman's second deposition.

Jurisdiction

The government argues that we lack jurisdiction over Ritchie's appeal because the district court has yet to fix the amount of its monetary

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[Feldman:] Whores, just like you too. You are a whore master, too. I was working for Uncle Sam. I was doing more than you were doing, Buster.

[6] The parties stipulate that Ritchie "suffered a brief psychotic episode on the night of December 20, 1957." They do not agree as to the cause of that episode.

sanctions award and the judgment below is therefore not final. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1483 (9th Cir. 1996); *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1329 (9th Cir. 1989). But Ritchie has expressly waived his right to monetary sanctions based on the government's misconduct during Feldman's depositions, leaving nothing for the district court to decide. We have jurisdiction. *See* 28 U.S.C. § 1291.

Discussion

1. Ritchie argues that in ruling on a motion for judgment based on partial findings, *see* Fed. R. Civ. P. 52(c), the district court must draw all reasonable inferences in favor of the non- moving party. According to Ritchie, the standard for entering judgment on, partial findings during a bench trial under Rule 52(c) is the same as for entering judgment as a matter of law during a jury trial under Federal Rule of Civil Procedure 50(a).

[1] Rules 50(a) and 52(c), however, assign very different functions to the district judge. Rule 50(a) provides that once a party has been fully heard on an issue during a *jury* trial, the court may grant a motion for judgment as a matter of law against the non-moving party only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). The rationale is obvious: During a jury trial, the jury-not the judge-is the trier of fact. Because the district judge lacks the authority to resolve disputed,

issues of .fact under those circumstances, judgment as a matter of law is appropriate only if no reasonable jury could find for a party on that claim. This necessarily means that the court must draw all reasonable evidentiary inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." (ellipsis in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)) (internal quotation marks omitted)). When the jury is the trier of fact, judgment as a matter of law is appropriate only if no reasonable jury could find in favor of the non-moving party. *See id.*

[2] By contrast, a motion for judgment on partial findings under Rule 52(c) may be made only during a bench trial. Under Rule 52(c), "the court may enter judgment as a matter of law . . . with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Fed. R. Civ. P. 52(c). Rule 52(c) expressly authorizes the district judge to resolve disputed issues of fact. *See* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."). In deciding whether to enter judgment on partial findings under Rule 52(c), the district court is not required to draw any inferences in favor of the non-moving party; rather, the district

court may make findings in accordance with its own view of the evidence.[7]

[3] Although Ritchie's behavior on December 20, 1957, may have been consistent with an LSD-induced psychotic episode, the district court reasonably found that "there are other plausible explanations for the symptoms that Ritchie described, including mild intoxication or some undiagnosed organic condition." The court concluded that it was "likely[ ] that Ritchie's behavior was caused by some organic factor, either alone or in combination with a modest degree of alcohol intoxication. It is also possible that Ritchie's apparent lapse of judgment was exactly what it appears to be." Although the court acknowledged that Ritchie's behavior may well have been consistent with an LSD-induced psychotic episode, the court noted that "[t]o take [this] inference . . . to

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[7] The Supreme Court has held with respect to Rule 52(c)'s predecessor that the district court need not give the non-moving party any favorable inferences. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990) ("[A]lthough a court might, after reviewing the evidence, decide in favor of the party moving for a dismissal under Rule 41(b) [Rule 52(c)'s predecessor], that court might not take the same case away from the jury because it might believe that the jury could *reasonably* find for the non-moving party."); *see also* Fed. R. Civ. P. 52 advisory committee's note to 1991 amendment.

That the phrase "judgment as a matter of law" appears in both Rule 50(a) and Rule 52(c) may be confusing, but it is not dispositive. As described above, the standard for entering judgment as a matter of law differs under each of these rules.

its logical conclusion" would compel the court "to find that LSD intoxication is the likely cause of almost any unexplained and superficially inexplicable behavior." The district court's finding that Ritchie did not carry his burden of proof is supported by the record.

[4] Although Feldman made a number of comments in his depositions suggesting that he was involved in drugging Ritchie, the district court's determination that Ritchie did not prove Feldman's involvement is not clearly erroneous. Feldman may have been lying to provoke defense counsel, trying to be funny, or simply speaking imprecisely when he made the purported admissions. Richie's lawyer asked no follow-up questions that might have elicited more detail about Feldman's vague assertions. Because Ritchie failed to prove he was drugged by the government (or by anybody else) on December 20, 1957, he has also failed to establish that the alleged drugging caused his misfortunes.[8]

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[8] This is a troubling case. Ritchie filed suit over four decades after the events in question, and long after memories had grown stale, witnesses had died and potentially relevant files had been destroyed. Despite that, Ritchie has persevered for many years to vindicate his name, and to find some measure of peace with the events of December 20, 1957.

Although we affirm the judgment against Ritchie, we think it is quite possible that everything Ritchie says happened did happen-that Ritchie was drugged by his own government, and suffered great personal and financial hardships as a result. But, although it is *possible* that Ritchie was drugged, the district court's finding that he has not proved it is not clearly

[5] 2. Ritchie claims that the district court erred in refusing to draw an adverse inference against the government from the fact that the CIA destroyed documents relating to its LSD experiments on unwitting victims. Parties should not be able to escape liability by destroying evidence of their own wrong-doing. The intentional destruction of evidence relevant to an issue at trial can therefore support an inference that the evidence would have been unfavorable to the party that destroyed the evidence. 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 291 (James H. Chadbourn rev. 1979).[9]

[6] This common law rule generally requires that the party seeking the adverse inference make a showing of relevance specific to the destroyed documents: The party must show that the document in question directly pertained to the disputed issue and could have supported its view of the facts. *See id.* at 228 (requiring "some evidence tending to show

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erroneous. Yet we know some people were drugged; the government admits as much. Ritchie's allegations of Cold War drugging by the CIA may thus be true, even though he could not prove them to the satisfaction of the district court. If Ritchie's claims are indeed true, he has paid a terrible price in the name of national security.

[9] The party requesting the inference must also show that the destroying party had an obligation not to destroy the evidence. The district court assumed without deciding that the government had such a duty here for the reasons articulated in *Kronisch*, 150 F3d at 127, and the issue is not contested on appeal.

that *the document actually destroyed* or withheld is *the one* as to whose contents it is desired to draw an inference" (emphasis altered)). This standard makes sense when one party alleges that the other has caused a specific document to disappear, such as a contract or a deed. In this context, the parties to a dispute are usually both aware of the relevant paperwork, and can testify as to its contents. *Kronisch*, 150 F.3d at 128.

[7] The situation is different where one party destroys documents containing information gathered from unwitting subjects; in such circumstances, the subjects have no information as to the exact content of the destroyed documents. The destruction thus prevents the victims from obtaining the proof they need to support the adverse inference. Application of the strict common law requirements in such circumstances would frustrate the adverse-inference rule and enable a party engaged in underhanded behavior to escape liability by regularly destroying documents.

[8] The Second Circuit confronted this conundrum in *Kronisch* and held that triers of fact must carefully consider whether the document destruction has made it more difficult for a party to prove that the documents destroyed were relevant. *Kronisch*, 150 F.3d at 128. If this is found to be the case, the burden on the party seeking the adverse inference is lower; the trier of fact may draw such an inference based even on a very slight showing that the documents are relevant, *Id.* We have cited

Kronisch with approval, *see Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 825 (9th Cir. 2002), and to the extent we have not previously done so, we adopt the Second Circuit's careful and balanced approach for dealing with this difficult problem.[10]

[9] Ritchie's proof at trial would have been sufficient to permit the district court to draw an adverse inference under the *Kronisch* standard, had it chosen to do so.[11] *See* 150 F.3d at 129. That is very

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[10] In *Kronisch*, the issue was presented in a somewhat different procedural posture, as it came up during review of a summary judgment motion. 150 F.3d at 116. The court considered whether the plaintiff had presented proof that would be sufficient, if presented at trial, to support a jury inference that the destroyed documents could have supported plaintiff s case. *Id.* at 126. While our case arises much later in the proceedings, the inquiry is the same: Was the evidence sufficient to permit a trier of fact to draw an adverse inference against the defendant?

[11] The proof in both cases was highly tenuous. The victim in *Kronisch* had been served a drink in a Paris bar by a man with a club foot. Gottlieb, the head of the CIA'S LSD project had a club foot and *could* have been in Paris at the time. 150 F.3d at 129 & n.12. Even though the government denied that it had conducted LSD experiments in Paris, or any experiments at all on U.S. citizens abroad, the Second Circuit nevertheless concluded that the plaintiff's evidence was sufficient to allow a trier of fact to draw an adverse inference against the government. *Id.* In our case, it is undisputed that LSD experiments on U.S. citizens were conducted in San Francisco. Ritchie's evidence linking the CIA with the events of December 20, 1957, was a diary entry on that date by George White,

different, however, from saying that the district court was *required* to draw an adverse inference against the government as to what the missing documents would have proven. The district judge here considered both the lack of direct evidence linking Ritchie's drugging with the destroyed documents and "the manifest weakness of the circumstantial evidence that Ritchie presented at trial." After evaluating the evidence Ritchie presented, the district judge determined that Ritchie was not entitled to a favorable evidentiary inference on the issue of liability. We cannot say that the district court was irrational in so concluding. *See Kronisch*, 150 F.3d at 129 (noting that despite surviving summary judgment, circumstantial evidence regarding proof of the documents "may prove to be altogether vulnerable at trial").

[10] **3.** Ritchie argues that the district court should have entered judgment against the United States on the question of liability as a sanction for various discovery abuses. Ritchie's first claim is based on what he argues was the government's presentation of, and reliance on, what it knew was perjured testimony (that of Feldman). The district court, however, found that Ritchie had not carried his burden of showing that the lawyer representing the government had knowingly presented perjured testimony. Feldman had been quoted in two published sources making statements that were

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Feldman's superior, reading: "home flu-xmas party Fed bldg Press Room."

inconsistent with some of his deposition testimony. But the district court reasonably concluded that the government was not required to accept those earlier statements as true; rather, it was entitled to proceed on the assumption that Feldman had testified truthfully at his deposition. The district court's finding that Ritchie failed to prove by clear and convincing evidence that the government acted in bad faith in relying on Feldman's deposition testimony is supported by the record. *Phoceene Sous-Marine v. US. Phosmarine, Inc.*, 682 F.2d 802, 806 n. 13 (9th Cir. 1982) (noting that bad faith must be proven by clear and convincing evidence). Because no violation was found, the district court's decision not to impose sanctions was obviously not an abuse of discretion.

The district court did find that the lawyer representing the government had acted in an "obdurate" and "obstreperous" fashion during Ritchie's deposition, and this may well have interfered with Ritchie's ability to elicit helpful testimony from Feldman. While terming the government lawyer's conduct "unprofessional," the district court refused to sanction the United States by entering judgment against it on liability, finding such sanctions to be " 'grossly out of proportion' to the harm" Ritchie had suffered from the lawyer's conduct. Instead, the district court selected a remedy that it considered "more closely proportionate to the gravity" of the government's misconduct, namely, the payment of Ritchie's reasonable costs and expenses for taking Feldman's second deposition.

In reaching this conclusion, the court noted that Ritchie would not, ultimately, be prejudiced by the government's misconduct because "at trial, plaintiff's counsel will have the opportunity to ask the follow-up questions that Feldman managed to evade as a consequence of [the government's] misconduct." And, indeed, Feldman was originally listed as a witness on the parties' Joint Pre-Trial Statement. Subsequently, however, the statement was amended, and Feldman was removed from the live witness list and was listed, instead, as testifying by way of deposition. There is no explanation in the record for this change, and certainly no objection from plaintiff.[12] Nor did plaintiff request that the district court extend the discovery period and allow him to depose Feldman, yet again.

[11] District Courts have broad discretion in imposing discovery sanctions. *See Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995). Moreover, preclusive sanctions, such as dismissal of a case or entry of judgment against a party, are disfavored. *See United States ex rel. Lujan*

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[12] In his reply brief before us, Ritchie suggest that he could not subpoena Feldman for trial, because he lived more than 100 miles away from the courthouse. *See* Fed. R Civ. Pro, 45(b)(2). But this matter was not raised with the district court. Nor did Ritchie file a motion for reconsideration of the district court's discovery order, on grounds that the remedy the district court envisioned-questioning Feldman at trial-was not viable in light of plaintiff's inability to subpoena Feldman. Not having been raised below, at a time when the district court might have been able to deal with the problem, this argument is waived.

v. Hughes Aircraft Co., 67 F.3d 242, 247-48 (9th Cir. 1995). When the district court chooses not to impose preclusive sanctions, and gives sound reasons for its actions-as the court did here-we must conclude that the court did not abuse its discretion.

4. Because we affirm on other grounds, we need not reach the government's alternative argument that the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193, bars Ritchie's claims under the FTCA.

AFFIRMED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---x

WAYNE A. RITCHIE,
Plaintiff-Appellant,
v.

UNITED STATES OF AMERICA, et al.
Defendant-Appellee.

---x

No. 05-16401
D.C. No. CV-00-03940-MHP
Northern District of California, San Francisco
ORDER

Before: **B. FLETCHER, KOZINSKI and FISHER**, Circuit Judges.

Not later than 21 days from the date of filing of this order, appellees shall file a response to the petition for rehearing en banc.

Filed September 11, 2006
Cathy A. Catterson
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---x

WAYNE A. RITCHIE,
Plaintiff-Appellant,
v.

UNITED STATES OF AMERICA, et al.
Defendant-Appellee.

---x

No. 05-16401
D.C. No. CV-00-03940-MHP
Northern District of California, San Francisco
ORDER

Before: **B. FLETCHER, KOZINSKI and FISHER,** Circuit Judges.

The petition for rehearing and the petition for rehearing en banc are denied.

Fed. R. App. P. 40; Fed. R. App. P. 35.

Filed October 18, 2006
Cathy A. Catterson
Clerk, U.S. Court of Appeals

Filed 07/05/2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
WAYNE A. RITCHIE,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant

No.C00-3940MHP

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Re: Motion for Judgment on Partial Findings

This action arises out of allegations that plaintiff Wayne A. Ritchie was a victim of a federal program that tested psychoactive drugs on unwitting subjects during the 1950s and 1960s. On April 6, 2005, a four-day bench trial commenced on Ritchie's claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. Following the presentation of Ritchie's case-in-chief, the government moved for judgment as a matter of law, which the court construed as a motion for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c).[1] At that point, the court declined to hear additional testimony and gave the parties the opportunity to submit post-hearing memoranda regarding the government's motion. Having considered the parties' submissions and the testimony presented at trial, the court enters the following findings of fact and conclusions of law.

BACKGROUND

I. Facts

Plaintiff Wayne Ritchie is a former Deputy United States Marshal who worked at the United States Post Office Building in San Francisco, California in the mid-1950s.[2] Ritchie's claims against the United States arise from allegations that he was given food or drink laced with lysergic acid diethylamide ("LSD") while he attended a Christmas party for federal employees held at the Post Office Building on December 20, 1957. Specifically, Ritchie contends that he is the victim of "Project MKULTRA," a Central Intelligence Agency ("CIA") program that was dedicated to the testing of LSD and other psychoactive drugs on unwitting subjects.

The existence of Project MKULTRA is now undisputed, and the government admits that CIA operatives in San Francisco were actively administering LSD to individuals without their knowledge or consent in December 1957. The project's San Francisco-based activities were carried out under the supervision of George White, an agent of the Federal Bureau of Narcotics who coordinated a CIA operation known as "Subproject 42" during the period from 1955 to 1963. Am. Joint Pretrial Statement, Undisputed Facts ¶¶ 21-22 (hereinafter "Undisputed Facts"). As the director of Subproject 42, White established a safehouse apartment in San Francisco where CIA agents tested psychoactive drugs on prostitutes and their clients. Feb. 7, 2003 Dep. of Ira Feldman at 421-27 (hereinafter "Second Feldman Dep."). Ira Feldman, a supervisory group head at the federal Bureau of Narcotics, was among

the agents who performed or supervised those testing activities. Undisputed Facts ¶22.

Ritchie's recollection of the events of December 20, 1957 is also largely undisputed. On that day, Ritchie reported to work at the Post Office Building and remained at his desk throughout the morning. Because of the upcoming Christmas holiday, most of Ritchie's co-workers at the Marshal's Office left work at approximately 12:00p.m. Id. ¶¶4,6; Tr. 50. At that time, Ritchie also briefly left his office to have lunch at the federal employees' Christmas party that was being held in the Press Room of the Post Office Building. Id. Upon arriving at the party, there were only three or four people present. Undisputed Facts ¶6. Ritchie stayed only briefly, having something to eat and also having one drink, a bourbon and soda, before returning to his office at approximately 12:30 p.m. Id. ¶¶7-8.

Ritchie remained at his desk until approximately 2:00 p.m. Id. ¶8. At that time, Ritchie's supervisor, Jim Eagan, returned from lunch and suggested that Ritchie return to the Christmas party, which by then had grown to a size of approximately thirty to fifty people. Id ¶¶8-9. Ritchie took Eagan up on his suggestion and made a second appearance at the party, arriving soon after Eagan's return and staying for approximately one hour. Id. ¶8, 10. During that time, he consumed three or four additional bourbon and sodas. Id. ¶8.

At approximately 3:00 p.m., Ritchie returned to his office. Id. ¶10. Sitting in his office alone, Ritchie soon began to experience what he has described as feelings of paranoia and worthlessness,

which were accompanied by an intense urge to leave the building. Tr. 52-53. Ritchie acted upon this urge at approximately 4:30 p.m., locking the office and leaving work thirty minutes earlier than was his usual practice. Id at 53; Undisputed Facts ¶ 10.

Ritchie left his car at the Post Office Building parking lot and proceeded to walk home to his apartment on Ellis Street, where he was greeted by Dorothy McGinn. Undisputed Facts ¶ 11. McGinn and Ritchie had been living together for six months in December 1957, and the couple was married in April 1958. Id.¶2; Tr. 81. Prior to that time, McGinn had lived in New York City, and according to Ritchie, she rarely missed an opportunity to comment upon the ways in which San Francisco compared unfavorably to her former home. Tr. 54-55. Ritchie was greeted to one such diatribe when he returned home on the evening of December 20. Id. at 55, 177. For whatever reason, Ritchie found McGinnis' commentary on that occasion to be unusually grating, and he left the couples' apartment soon after he had arrived. Id. at 55. Undisputed Facts ¶13.

Ritchie then proceeded to the Vagabond Bar, where he was a regular customer, and ordered two more drinks, again both bourbon and sodas. Id. However, Ritchie continued to experience feelings of restlessness, which he has characterized as shading into paranoia, and he left the bar approximately twenty- to-thirty-five minutes after he had arrived and began to walk toward his office. Tr. 56; Undisputed Facts ¶13. It was during his walk to the Post Office Building that Ritchie planned the armed

robbery that he was to attempt to carry out later that evening. Tr. 59. The inspiration for this plan remains uncertain, although Ritchie concedes that he was motivated by McGinn's desire to return to New York and his intent to purchase a plane ticket that would permit her to do so. Undisputed Facts ¶ 14. Ritchie also testified that he planned the robbery fully expecting to be caught, imprisoned, and fired from his job at the Marshal's Office, but he explains that he was overcome by a sense of worthlessness that compelled him to engage knowingly in self-destructive conduct Tr. at 57-58; see also id. ¶14.

In the course of his walk, Ritchie stopped at three more bars before arriving at the Post Office Building, although he testified that he ordered only nonalcoholic beverages at each stop, Tr. 58-59. Upon his arrival, Ritchie removed two guns from his locker and retrieved his car from the Post Office Building's parking lot. Undisputed Facts ¶¶ 14-15. From there, he drove to the Fillmore District, which was at the time a heavily African-American neighborhood of San Francisco where Ritchie was certain that he would not be recognized. Id. ¶ 15; Tr. 59. When he reached Fillmore Street, Ritchie parked his car and walked into the nearest bar. Undisputed Facts ¶ 16; Tr. 59. However, upon seeing that there were no customers in the bar, Ritchie left immediately and sought out another target, walking down the street to a second bar, the Shady Grove. Undisputed Facts ¶¶ 16- 17. Ritchie entered the Shady Grove, sat down at one end of the bar, and ordered a bourbon and soda. Id. ¶ 17. After finishing his drink, Ritchie walked up to the serving station at the other end of

the bar and demanded money from the bartender. Id. The bartender put cash on the counter, but Ritchie demanded more money. Id. At that point, a waitress approached Ritchie from behind and asked him what his was doing. Id. When Ritchie turned around, he was hit on the head and knocked unconscious. Id.

Ritchie was subsequently taken into custody and charged with attempted robbery with a deadly weapon. Id. ¶¶ 17,20. He pleaded guilty to the offense charged, and on March 12, 1958, he was sentenced to five years probation and was ordered to pay a $500 fine, his sentence of imprisonment having been suspended by the court Id. ¶20. Ritchie resigned from his position at the Marshal's Office immediately following his arrest Id.¶19.

It did not occur to Ritchie that his aberrant behavior on the evening of December 20, 1957 might have been caused by the ingestion of LSD until the late 1990s, when he learned of Project MKULTRA and other federal programs for testing psychoactive drugs on human subjects. Having been alerted to the possibility that he was a victim of Project MKULTRA, Ritchie filed Notices of Claim with the CIA and Drug Enforcement Agency ("DEA") on October 22, 1999. Those claims were denied on April 26, 2000, and the instant action followed.

II. Procedural History

A. Ritchie's Complaint

On October 25, 2000, Ritchie filed the instant action in this court, alleging that his criminal conduct on the night of December 20, 1957 was the product of LSD intoxication and asserting causes of

action under the First, Fourth, Fifth, and Eighth Amendments of United States Constitution as well as a claim under the FTCA. The court dismissed Ritchie's constitutional claims on July 12, 2000, holding that they were barred by California's one-year statute of limitations for personal injury actions. However, in its July 1, 2002 order, the court declined to dismiss Ritchie's FTCA claim, and the parties proceeded to adjudicate that claim on the merits, with Ritchie advancing the theory that a government agent introduced LSD into one of the drinks that he consumed during his second visit to the federal employees' Christmas party on December 20, 1957.

B. Summary Judgment

On May 24, 2004, the government moved for summary judgment on two issues related to proof of liability. The government first sought summary judgment on the issue of whether a government agent actually administered LSD to Ritchie on December 20, 1957. The second issue identified by the government's motion focused on what the parties referred to as "LSD causation" - i.e., whether ingesting LSD was the actual and proximate cause of Ritchie's attempted robbery of the Shady Grove Bar. Ritchie opposed that motion as to both issues and cross-moved for summary judgment on the question of whether he was administered LSD by a government agent without his knowledge or consent.

With respect to the first issue identified by the government's motion, Ritchie's attempt to meet his burden of proof on summary judgment relied heavily upon the testimony of Ira Feldman. As noted above,

Feldman was a Bureau of Narcotics employee and San Francisco-based Project MKULTRA operative at the time that Ritchie's alleged drugging occurred. At the first of two depositions, Feldman categorically denied any involvement in administering LSD to Ritchie or to anyone else. However, after new evidence surfaced linking Feldman to Project MIKULTRA, the court permitted Ritchie's counsel to depose Feldman again. During his second deposition, on February 7, 2003, Feldman recanted his earlier testimony denying his involvement in Project MIKULTRA and admitted that he participated in the program under George White's supervision. Second Feldman Dep. at 346-47, 360-63, 428-35. Feldman further testified that he had been involved in drugging non-consenting victims with LSD, admitting, *inter alia*, that Project MKULTRA agents administered LSD to unwitting victims in bars by slipping the drug into their drinks. Id. [3]

Feldman also testified regarding his knowledge of Ritchie's criminal conduct on the evening of December 20, 1957. Id. at 428-29, 435. In moving for summary judgment, Ritchie characterized this testimony as unambiguously implicating Feldman in Ritchie's drugging. However, the court disagreed, noting various inconsistencies in Feldman's testimony and the lack of any explicit admission from Feldman that be surreptitiously administered drugs to Ritchie or assisted another person in doing so. Order Re Mot. for Summary Judgment at 9-12 (May 24, 2004) (hereinafter "Summary Judgment Order"). Thus, observing that such testimony left it "in the position of essentially

inferring facts from sideways comments, rather than from explicit testimony," the court held that Feldman's deposition testimony, while sufficient to create a genuine issue of material fact on the question of whether Ritchie was drugged by a government agent, fell well short of what was required to enter summary judgment in Ritchie's favor. Id. at 11-12.

With respect to the second, "LSD causation" issue raised by the government's motion, Ritchie's principal evidence proffered was then, as it is now, the testimony of Dr. James S. Ketchum, a psychiatrist who tested LSD and other psychoactive drugs on enlisted military personnel at Edgewood Arsenal, Maryland during his service as an officer in the United States Army "Chemical Corps." As he relates in his expert report, Dr. Ketchum evaluated Ritchie using a "differential diagnosis" methodology, through which be sought to disaggregate the various causal factors that may have contributed to Ritchie's conduct on December 20,1957. James S. Ketchum, Psychiatric Evaluation of Wayne Ritchie, at 8-20 (Dec. 5, 2001) (hereinafter "Ketchum Rep."). After examining Ritchie, Dr. Ketchum ruled out both alcohol intoxication and endogenous factors as likely explanations for Ritchie's behavior and concluded that LSD-induced temporary psychotic disorder was the only possible explanation for Ritchie's decision to hold up the Shady Grove Bar, Id. Contrasting this evidence with the conflicting opinions of two medical experts retained by the government, the court held that Dr. Ketchum's testimony was sufficient to create a triable issue of fact as to whether LSD

intoxication caused Ritchie to attempt to commit armed robbery on December 20, 1957. Summary Judgment Motion at 17-18. Accordingly, the court denied both parties' motions for summary judgment in their entirety, Id. at 18, and Ritchie's FTCA claim proceeded to trial.

C. Trial

Beginning on April 6, 2005, the court held a four-day bench trial on Ritchie's FTCA claim. In presenting his case-in-chief, Ritchie called two live witnesses, himself and Dr. Ketchum. In addition, Ritchie relied on the deposition testimony of a number of witnesses who were unavailable to testify at trial, including various segments of Ira Feldman's deposition that he introduced for the purpose of establishing the government's involvement in his drugging. At the close of Ritchie's case-in-chief, the government moved to exclude Dr. Ketchum's testimony, asserting a number of grounds for disqualifying him as an expert under Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993). In addition, the government moved for judgment as a matter of law, which the court acknowledged to be a motion for judgment partial findings in a bench trial pursuant to Federal Rule of Civil Procedure 52(c).

Ruling from the bench, the court denied the government's Daubert motion, finding that Dr. Ketchum is qualified as an expert as to the effects as LSD on individuals. Tr. 671-72. The court nonetheless found that Dr. Ketchum's methodology for determining whether LSD caused Ritchie's behavior suffered from "a number of flaws," Id. at

672, and that in any event, the evidence that Ritchie was administered LSD by a government agent or by anyone else on December 20,1957 was not sufficient to meet his burden of proof on that issue, Id. at 672-75. The court thus tentatively granted the government's motion for judgment on partial findings and permitted the parties to file post-trial memoranda for the purpose of addressing whether Ritchie had presented sufficient evidence to meet his burden of proving his FTCA claim.

Ritchie subsequently requested leave to file a supplemental memorandum in light of his failure to anticipate the arguments raised in the government's brief in support of its motion. The court granted that request and his (sic) since received supplemental memoranda from both parties. Thus, having received all of the relevant post-trial submissions, the government's motion for judgment on partial findings is now ripe for adjudication.

LEGAL STANDARD

> Federal Rule of Civil Procedure 52(c) states:
>
> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue....

Fed. R. Civ. P. 52(c). A judgment entered pursuant to Rule 52(c) must be supported by findings of fact and conclusions of law. Id. As with finding of fact made alter a completed bench trial, findings of fact made pursuant to Rule 52(c) are reviewed on appeal for clear error, the district court's legal conclusion are reviewed de novo. Dubner v. City & County of San Francisen 266 F.3d 959,964 (9th Cir. 2001) (citations omitted).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The government's motion for judgment on partial findings requires the court to determine whether Ritchie can prove that he was unwittingly administered LSD by a federal agent on December 20, 1957 and that his reaction to the drug caused him to attempt to rob the Shady Grove Bar on that date. In resolving these issues, the court is required to set forth findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(c). However, before doing so, it must first address Ritchie's contention that he is entitled to a Favorable evidentiary inference on the issue of liability.

I. Ritchie's Entitlement to a Favorable Evidentiary Inference

A. The CIA'S Destruction of Documents

As noted above, Ritchie argues that he should benefit from a favorable evidentiary inference on the issue of liability. The first basis he identifies for drawing such an inference is the CIA's destruction of files related to Project MKULTRA in 1973. Citing the findings of the report of the Senate Select

Committee that investigated the CIA's testing of psychoactive substances on human subjects ("the Church Committee"), Ritchie asserts that the CIA intentionally destroyed Project MKULTRA-related documents in contravention of its own document-retention policy and that it did so for the purpose of precluding future claimants from obtaining access to the documents. See. Final Report of the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2d Sess. at 404 (Apr. 26,1976) (hereinafter "Church Committee Report"). Ritchie thus urges the court to infer that the destroyed files must have included documents tending to establish that he was drugged by a CIA operative.

The court assumes without deciding that the government had a duty to preserve documents related to Project MKULTRA at the time that the project-related files were destroyed. That was the holding of the Second Circuit in Kronisch v. United States 150 F.3d 112 (2d Cir. 1998), appeal after remand 213 F.3d 626 (2d. Cir. 2000), cert. denied. 531 U.S. 1078 (2001), which, like the instant action, involved a claim that the CIA administered LSD to an unsuspecting individual in the 1950s. Id. at 116, 127. This court has reason to doubt the wisdom of the Second Circuit's rejection on that issue. Nevertheless, as the Kronisch court recognized, the mere fact that a litigant has a duty to preserve evidence is not by itself sufficient to warrant inferring that the evidence destroyed would have been unfavorable to the party responsible for its destruction. Rather, the Second Circuit made clear

that the party seeking to benefit from such an inference must make "some showing indicating that the destroyed evidence would have been relevant to the contested issue." Id. at 127 (citing Stanoiev v. Ebasco Services. Inc. 643 F.2d 914,923-24 (2d Cir.1981), and Skeete v. McKinsey & Co.. No. 91 Civ. 8093, 1993 WL 256659, at *7 (S.D.N;Y. July 7,1993)). Thus, citing Wigmore's treatise, the Kronisch court concluded that a party seeking to draw an adverse inference from the destruction of a document must "first introduce some evidence tending to show that the document actually destroyed. . . is the one as to whose contents it is desired to draw an inference." Id. at 127-28 (quoting 2 John Henry Wigmore, Evidence in Trials at Common Law, § 291, at 228 (James H. Chadboum rev. 1979)) (original emphasis omitted) Kronisch was cited with approval by the Ninth Circuit in Medical Laboratory Management Consultants v. American Broadcasting Cos., 306 F.3d 806(9th Cir. 2002).See id. at 825 (quoting Kronisch 150 F.3d at 128) (original alterations omitted) (observing that "when a party has produced no evidence - or utterly inadequate evidence-in support of a given claim, the destruction of evidence, standing alone, is not enough to allow the party to survive summary judgment on that claim"). The rule that the Kronisch court adopted also comports with common sense; indeed, if no such showing were required, the finder of fact would be permitted to take the speculative assertions of the party seeking to benefit from the adverse inference at face value. Such a result would be contrary to the purpose of sanctioning the

destruction of evidence, which is intended to "place the innocent party in the same position [that] he would have been in had the evidence not been destroyed." Kronisch, 150 F.3d at 127. Accordingly, the court finds the rule set forth in Kronisch to be apposite to the materially indistinguishable facts of the instant action.

That being the case, the procedural posture of this action differs from Kronisch, which came before the Second Circuit on appeal of the district court's order granting the defendants' motion for summary judgment See 150 F.3d at 120. In contrast, the plaintiff in the case at bar has survived summary judgment and now bears the burden of proving his claim to the finder of fact. This distinction is critically important, as Ritchie has now had the opportunity to present his case-in-chief at trial but has nonetheless failed to submit even a scintilla of evidence tending to establish that the CIA destroyed any documents pertaining to him, much less that it destroyed documents tending to show that he was drugged by a government agent on December 20, 1957. This court simply cannot permit Ritchie to substitute speculation about what "must have" been in the CIA's Project MKULTRA-related files for facts tending to show that the files probably (or even possibly) contained evidence that would have proven his claim. This is particularly true in light of the manifest weakness of the circumstantial evidence that Ritchie presented at trial, which is discussed at length below. The court therefore finds that the CIA's destruction of Project MKULTRA-related files

does not entitle Ritchie to a favorable evidentiary inference on the issue of liability.

B. Obstruction of the Second Feldman Deposition

Ritchie's second ground for urging the court to draw an inference in his favor on the issue of liability arises from the conduct of Assistant United States Attorney ("AUSA") Patricia Kenney during Ira Feldman's second deposition. In its January 5, 2005 order, the court found Kenney's "obdurate" behavior during that deposition to be sanctionable under Federal Rule of Civil Procedure 30(b)(3) and thus imposed monetary sanctions against Kenney and her client. Order Re Sanctions at 15-16 (January 5, 2005) (hereinafter "Sanctions Order"). Ritchie now argues that the court should also sanction Kenney's behavior by inferring that Feldman would have incriminated himself in Ritchie's drugging if counsel had been permitted to continue questioning him without interruption.

As the court noted in its January 2005 order, Rule 30(b)(3) permits the court to impose "an appropriate sanction" against any person responsible for frustrating the fair examination of a deponent. Fed. R. Civ. P 30(b)(3). The court also has the inherent authority to sanction discovery-related misconduct when that conduct interferes with "the orderly administration of justice and the integrity of the court's orders." Halaco Eng'g Co. v. Costle 843 F.2d 376,380 (9th Cit. 1988) (citing United States v. National Med. Enters, Inc., 792 F.2d 906, 912 (9th Cit. 1986)). Ultimately, the imposition of sanctions is left to the sound discretion of the court. Anheuser-Busch. Inc. v. Natural Beverages Distribs., 69 F.3d

337, 348(9th Cir. 1995) (citing Halaco 843 F.2d at 379). There is little doubt that under certain circumstances, sanctions for an attorney's misconduct during discovery may include drawing an adverse evidentiary inference against his or her client, C.F. Wyle v. R. J. Remolds Indus. Inc. 709 F.2d 585,589 (9th Cir. 1983) (noting that , discovery abuses may lead to imposition of default judgment or preclusive sanctions under "extreme circumstances"). However, the court has already made it clear that such circumstances are not present here. As noted above, the court's January 2005 order found Kenney's behavior during Feldman's second deposition to be "obdurate" and "unprofessional." Sanctions Order at 15. Nevertheless, the court observed that the sanctions that Ritchie sought - establishing the liability element of his claim as a matter of law-were "grossly out of proportion" to the harm caused by Kenney's misconduct Id. Thus, while the court found it appropriate to impose less severe sanctions under Rule 30(b)(3), it refused to permit Ritchie to use Kenney's behavior "as an excuse to avoid his obligation to prove his prima facie claim for relief by presenting evidence at trial" and thus denied his request for preclusive sanctions. Id.

There is nothing in the record to suggest that a different conclusion is warranted with respect Ritchie's latest attempt to avoid his obligation to present evidence that would prove his claim. Indeed, whatever effect Kenney's misconduct might have had on Feldman's willingness to confess to administering LSD to Ritchie, Ritchie's own

testimony, which is discussed below, conclusively, establishes that Feldman was not at the federal employees' Christmas Party on December 20, 1957. Tr. 138; see also, Undisputed Facts ¶¶ 9, 23. In light of such uncontroverted evidence, it is wholly inappropriate to infer Feldman's involvement in Ritchie's drugging from a few ambiguous statements in his deposition testimony.[4] The court therefore rejects Ritchie's attempt to draw an evidentiary inference in his favor from Kenney's conduct during the second Feldman deposition.

II. Finding of Fact

Having concluded that Ritchie cannot rely on favorable evidentiary inferences to relieve himself of the burden of proving his claim, the court must now turn to the factual issues raised by the government's motion for judgment as matter of law. As noted above, that motion identifies two related factual determinations that the court must make in order to adjudge the government liable under the FTCA. First, the court must consider whether a federal agent administered LSD to Ritchie at the federal employees Christmas party held at the Post Office Building on December 20, 1957. If the court answers that question in the affirmative, it must then determine whether the ingestion of LSD caused Ritchie to attempt to rob the Shady Grove bar later that evening. To prevail under the FTCA, Ritchie must prove both the commission of the tortious act and the element of causation by a preponderance of the evidence.

The court first considers whether the evidence in the record establishes that Ritchie was drugged by

a government agent at the federal employees' Christmas party that took place on December 20, 1957. As noted above, Ritchie's attendance at that party is not in doubt, nor is the fact that he consumed food and drink at the party. It is thus at least theoretically possible that someone could have laced that food or drink with LSD. Based on Dr. Ketchum's testimony regarding the effects of LSD intoxication, this would have been most likely to have occurred during Ritchie's second appearance at the Christmas Party, at approximately 2:00 p.m. on the afternoon of December 20. Tr. 471, 483. However, among the thirty to fifty people who were in the Press Room at that time, Ritchie could not identify anyone as a likely Project MKULTRA operative. Indeed, it is particularly significant that Ritchie does not recall seeing Ira Feldman or George White at the party, both of whom he would have assuredly recognized on sight Tr. 138; Undisputed Facts ¶ 9,23. Accordingly, while it may be true that Ritchie did not know every person who was in attendance at the Christmas party,[5] his assertion that a Project MKULTRA agent must have been there and must have laced one of his drinks with LSD is purely speculative.

Nothing in Ira Feldman's deposition testimony is to the contrary. Feldman's description of Ritchie's behavior on the evening of December 20, while colorful, falls well short of an unambiguous admission of guilt.[6] As this court has previously observed, the passages from Feldman's deposition on which Ritchie relies can easily be characterize as a

"needless and unfortunate comparison" of Ritchie's behavior with that of Feldman's victims rather as an admission that Ritchie was himself one of those victims. Summary Judgment Order at 10-11. The court the court has also already commented upon counsel's failure to make any attempt to clarify such ambiguity, observing:

> It is also noteworthy that on no occasion did plaintiffs counsel follow Feldman's allusions to Ritchie with more direct question designed to pin down precisely what Feldman intended to be saying. The absence of such questioning certainly does not eviscerate the potential veracity of plaintiffs observations regarding Feldman's admissions, but nonetheless it leaves this court in the position of essentially inferring facts from sideways comments, rather than explicit testimony.

Id. at 11 (endnotes omitted). As Feldman did not testify at trial, this observation applies with equal force here. Accordingly, Feldman's testimony would be entitled to little weight under the best of circumstances, and it certainly fails to overcome the obvious inference that can be drawn from Ritchie's testimony that he did not see Feldman at the party, that being that Feldman was not there and thus could .not have put LSD in Ritchie's drink.

This leaves Ritchie to rely on evidence that certain federal agents who lived and worked in San Francisco in December 1957 were administering

LSD to unwitting victims and that some of those agents would have been invited to attend the federal employees' Christmas party on December 20 as the sole basis for inferring that a Project MKULTRA agent was present at the party and administered LSD to him there. However, there is nothing in the record that supports such a speculative inference. The court thus finds that Ritchie has failed to prove that he was drugged by a government agent on the date in question.

In fact, it is doubtful that Ritchie was unwittingly drugged by anyone on December 20, 1957. Admittedly, Ritchie testified to having a number of physical and psychological symptoms that could plausibly be characterized as reactions to LSD, including feelings of paranoia and restlessness, the blurring of his peripheral vision, and a sense that he was moving effortlessly as he walked home from the Post Office Building on the evening of December 20. Tr. 52-54, 501. The court does not doubt the sincerity of Ritchie's testimony. At the same time, proper consideration must be given to the inevitable blurring of one's recollection with the passage of time, as well as to Ritchie's understandable desire to seek an explanation for his behavior on the evening of December 20, 1957 that would absolve him of responsibility for what he had for many years considered to be an unforgivable lapse of judgment. Thus, while it cannot be discounted entirely, Ritchie's testimony regarding the symptoms that he subjectively experienced after he left the Christmas party must be viewed with a healthy dose of skepticism.

Moreover, there are other plausible explanations for the symptoms that Ritchie described, including mild intoxication or some undiagnosed organic condition. The court is mindful that Dr. Ketchum opined that LSD-induced psychotic disorder is the sole possible explanation for Ritchie's conduct on the evening of December 20, 1957. Id. at 308. Specifically, in performing his "differential diagnosis" of Ritchie, he ruled out alcohol intoxication or alcoholism as causes of Ritchie's criminal conduct. Id. at 309-10, 486-87. The court agrees that alcohol consumption was not likely to have been the sole factor that led Ritchie to attempt to rob the Shady Grove that evening. The record establishes that Ritchie was at the time a habitual drinker who drank to excess with occasional-to-moderate frequency, see generally id. at 166-70, but there is no evidence that he suffered from alcohol dependency. Moreover, although Ritchie had at least seven drinks over the course of the four-to-six hour period prior to the time that he attempted to rob the bar, his testimony is consistent with the relatively high tolerance for alcohol that one would suspect from a habitual drinker.

Nevertheless, it is still possible, and the court believes likely, that Ritchie's behavior was caused by some organic factor, either alone or in combination with a modest degree of alcohol intoxication. It is also possible that Ritchie's apparent lapse of judgment was exactly what it appears to be. Dr. Ketchum's testimony completely discounts these possibilities. in so doing, he makes the leap from a diagnosis that Ritchie's symptoms were consistent

with LSD intoxication (a point on which the court agrees) to the conclusion that Ritchie must have been given LSD at the Christmas party. However, while Dr. Ketchum went to great lengths to disabuse the court of the popularly held notion that users of LSD invariably experience the drug's "psychedelic" effects, see Id. at 261-23 (sic), the upshot of his testimony is that the effects of LSD ingestion vary widely with the amount of the dose, the circumstances under which the drug is taken and the user's mental state at the time he is given the drug. See, e.g. id. at 557 (observing that "perceptual distortions [caused by LSD ingestion] are so variable that it's almost impossible to list all of them"); Id. at 573 (discussing the effects of the setting under which LSD is consumed on the symptoms reported by the subjects of clinical testing). To take the inference that he draws from Ritchie's behavior to its logical conclusion, the court would be compelled to find that LSD intoxication is the likely cause of almost any unexplained and superficially inexplicable behavior. Such a finding would of course be erroneous, and so the premise upon which it is based is equally suspect. Yet that premise is precisely what the court would be required to believe to credit Dr. Ketchum's testimony on the issue of causation. The court therefore finds that his testimony is appropriately disregarded, and in *any* event is not persuasive, to the extent that it seeks to establish a causal connection between the ingestion of - LSD and Ritchie's criminal behavior on the evening of December 20, 1957.

Seeing that there is no other evidence that the

ingestion of LSD caused Ritchie to commit attempted robbery on the evening of December 20, 1957, the court finds that Ritchie has not shown that he ingested LSD on that date, much less that he was drugged by a government agent without his knowledge or consent. It thus follows a *fortiori* that Ritchie has not established that it is more likely than not that LSD-induced psychotic disorder caused him to attempt to rob the Shady Grove Bar.

III. Conclusions of Law

The FTCA provides that "[tlhe United States shall be liable, respecting the provision of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. Consequently, the federal government may generally be found liable for torts. including the type of personal injury claim asserted in the instant action, whenever liability could also be found with respect to a I private actor. See Taghadami v. United States, 401 F. 3d. 1080, 1083 (9th Cir. 2005). To prevail on his personal injury claim, Ritchie must prove by a preponderance of the evidence that he was given LSD by a government agent without his knowledge and consent on December 20, 1957 and that the ingestion of LSD caused him to attempt to rob the Shady Grove Bar later that evening.

Based on the findings of fact set forth above, it is clear that Ritchie cannot meet his burden of proof with respect to either of those elements of his claim.

Specifically, the court concludes that:

1. Ritchie has not proven that he was administered LSD by an agent of the federal government or by anyone else on December 20, 1957; and

2. Ritchie has not established by a preponderance of the evidence that his criminal conduct on the evening of December 20, 1957 was caused by LSD-induced psychotic disorder.

Accordingly, because Ritchie has been fully heard on each of these issues and an adverse finding as to either would be sufficient to defeat his claim under the FTCA, the court concludes it is appropriate to enter judgment as a matter of law pursuant to Federal Rule of Civil Procedure 52(c). The court therefore grants the government's motion for judgment on partial findings.

The foregoing findings of fact and conclusions of law are deemed the court's findings and conclusions pursuant to Rule 52(a). Any findings of fact contained in the conclusions shall be deemed findings of fact and any conclusions of law contained in the findings shall be deemed conclusions of law.

CONCLUSION

For the reasons stated above, the court GRANTS defendant's motion for judgment on partial findings. A judgment shall enter accordingly.

IT IS SO ORDERED.
Dated: July 5, 2005

/s/
MARILYN HALL PATEL

ENDNOTES

1. As the United States subsequently realized, Federal Rule of Civil Procedure 50, which governs motions for judgment as a matter of law, applies only to trials by jury. See Fed. R. Civ. P. 50. In a bench trial, Rule 52(c) sets the proper standard for moving for judgment on partial findings at the close of the plaintiff's case-in-chief. See Fed. R. Civ. P. 52(c).

2. The Post Office Building, located at the intersection of 7th and Mission Streets. now houses the United States Court of Appeals for the Ninth Circuit. In 1957, the building was occupied by this court.

3. Feldman's testimony is ambiguous &s to whether he actually gave LSD to unwitting victims in bars himself. While on balance the court finds it likely that he did, that conclusion does not affect the outcome of these proceedings, which turns on whether Feldman (or some other, unidentified government agent) administered LSD to Ritchie without his knowledge and consent.

4. The justification for such an adverse inference is particularly weak in light of Feldman's advanced age and deteriorating physical condition, which were doubtlessly compounded by the characteristically incoherent examination style that Ritchie's counsel employed taking his deposition.

5. The court nonetheless notes that Ritchie testified that he "recognized most of [the people at the party] from working around the courts." Tr. 144.

6. As the court observed in its May 2004 order denying the parties' cross motions for summary judgment, there are three passages from Feldman's February 2003 deposition in which he arguably inculpates himself in Ritchie's drugging. In the first such passage, Feldman stated: "I drugged guys involved in about ten twelve, period. [sic]. I didn't do any follow-up, period, because it wasn't a very good thing to go and say 'How do you feel today?' You don't give them a tip. You just back away and let them worry like this nitwit, Ritchie." Second Feldman Dep. at 428. Following that statement, Feldman engaged in a colloquy with counsel in which he appeared to inculpate himself in Ritchie's drugging a second time:

Q. When you say 'let them worry,' you mean let them have a full head of LSD and let -

A. Let them have a full head, like what happened, like what happened with this nut when he got out and got drunk.

Id. at 428-29. Later, Feldman was asked if he were essentially "deciding who was going to suffer," and implicitly referenced Ritchie a third time, replying that:

> I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone.

Id. at 435.

Filed June 6, 2005
CAPTION
ORDER

On April 27, 2005, defendant moved to vacate the court's January 5,2005 order imposing monetary sanctions on the United States and on Assistant United States Attorney ("AUSA") Patricia Kenney pursuant to Federal Rule of Civil Procedure 30(d)(3). In the alternative, defendant seeks leave to file a motion for reconsideration of that order pursuant to Civil Local Rule 7-9(b).

In the order that defendant now seeks to vacate, the court found that Kenney improperly employed obstructionist tactics in defending the deposition of Ira Feldman on February 7, 2003. While it concluded that this misconduct was not sufficiently egregious to warrant the sanctions sought by plaintiff - precluding defendant from presenting a defense on the issue of liability – the court nevertheless found that a less severe penalty was appropriate. The court thus imposed monetary sanctions on defendant and on Kenney, ordering each of them to pay one-half of the attorney's fees that plaintiff incurred in taking Feldman's February 2003 deposition.

In seeking to vacate that order, defendant argues that the court failed to give adequate notice before imposing sanctions under Rule 30(d)(3). It is of course true that a court may not sanction a litigant or an attorney *sua sponte* without first providing the target of the penalty an opportunity to show cause why sanctions should not be imposed. *Navelier v. Sletten*, 262 F. 3d 923, 943 (9th Cir. 2001)

(citation omitted), cert. denied, 536 U.S. 941 (2002). However, what due process requires is notice of the possibility that sanctions may be imposed and an opportunity for the litigant or attorney to defend himself or herself against the allegations of misconduct. See *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F. 3d 1145, 1164-65 (9th Cir. 2003). While it may be true that plaintiff moved for sanctions pursuant to the court's inherent power rather then pursuant to Rule 30(d)(3), plaintiffs motion and defendant's opposition to that motion explicitly addressed the conduct that the court ultimately found to be sanctionable. That the court decided to impose a less severe penalty than that which was sought by plaintiff hardly prevented defendant or Kenney from vigorously defending themselves against the allegations of misconduct that were addressed in the January 2005 order. Accordingly, the court finds that defendant received all the process that was due prior to the court's decision to impose sanctions under Rule 30(d)(3). Defendant's motion to vacate the order imposing those sanctions must therefore be denied.

Alternatively, defendant requests leave to file a motion for reconsideration of the court's January 2005 order. This request is premised upon evidence' that came to light during the April 2005 trial held in the instant action, which defendant characterizes as establishing conclusively that plaintiff suffered no prejudice from Kenney's misconduct. The court cannot accept this characterization of the trial record. Simply put, the prejudicial effort of Kenney's obdurate cannot be ascertained from the evidence

presented at trial, just as it could not be determined based on the facts in the written record. In any event, the court has already made clear that its rationale for imposing sanctions was not premised upon the prejudicial effect of Kenney's misconduct, but rather upon the ethical impropriety of the conduct itself. Accordingly, defendant's suggestion that the court should reconsider its January 2005 order is not well taken. Its request for leave to file a motion for reconsideration of that order is therefore denied.

CONCLUSION

For the reason stated above, the court DENIES defendant's motion to vacate the court's January 5, 2005 order imposing sanctions upon it and upon AUSA Patricia Kenney and DENIES defendant's motion for leave to file a motion for reconsideration of that order.

IT IS SO ORDERED

Dated: June 6, 2005

/s/

MARILYN HALL PATEL

District Judge

Filed January 5, 2005
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
No. C 00-3940 MHP

WAYNE A. RITCHIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM & ORDER
Re: Plaintiff's Motion for Sanctions

This action arises out of allegations that plaintiff Wayne Ritchie was a victim of a federal program to test psychoactive drugs on unknowing and unwitting individuals 'during the 1950s. Plaintiffs remaining causes of action seek relief under the Federal Tort Claims' Act ("FTCA"), 28 U.S.C. § 2671 et. seq., alleging that agents of the Central Intelligence Agency ("CIA") and the federal Bureau of Narcotics administered psychoactive drugs to him without his knowledge or consent and that this non-consensual testing caused plaintiff to commit armed robbery on December 20, 1957. Plaintiff now moves for sanctions based on various instances of misconduct allegedly committed by the United States and its counsel during pretrial proceedings. Specifically, plaintiff requests that the court exercise its inherent power to strike the United

States' answer and enter summary judgment in his favor on the issue of liability. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

I. Facts

The court has set forth the factual and procedural background of this action in a number of previous orders. See Ritchie v. United States ("Ritchie I"), 210 F. Supp. 2d 1120 (2002) Order Denying Defendant's Motion to Dismiss); Ritchie v. United States ("Ritchie II"), No. C 00-3940 MHP, 2004 WL 1161 171 (ND. Cal. May 24, 2004) (Order Denying Cross- Motions for Summary Judgment). As the court explained in those orders, the facts alleged in plaintiff's complaint are as follows: on December 24 1957, plaintiff was unwittingly given food or drink laced with lysergic acid diethylamide ("LSD") or another psychoactive drug while he was attending a holiday party in the United States Post Office Building in San Francisco, California. Pl.'s Compl. ¶¶ 11-12. After drinking a substantial quantity of alcohol at the party and at several bars, plaintiff, fueled by drug-induced paranoia, resolved to hold up a bar and returned to his office where he took two revolvers from his personal locker. Id. ¶ 13-15. From there, plaintiff went to the Shady Grove Bar, where he had another drink and then drew a weapon and demanded money. Id. ¶ 15. Someone knocked Ritchie unconscious, and he was subsequently arrested. Id.

The United States now admits that during the 1950s, the CIA operated a federal program, known as "Project MKULTRA," that was dedicated to the research and development of LSD and other drugs that might be used to alter human behavior. The United States has also admitted that the program's activities in San Francisco ("CIA Subproject 42") were headed by George White, an agent of the Bureau of Narcotics who served as an MKULTRA subcontractor from approximately 1953 to 1964. McGinn Decl. ¶ 5. In that role, White established a safehouse apartment in San Francisco where psychoactive drugs were tested on drug informants and prostitutes. Id. Among the agents that White employed for this purpose was Ira Feldman, a supervisory group head at the Federal Bureau of Narcotics. See generally Dep. of Ira Feldman (Feb. 7, 2003) (hereinafter "Second Feldman Dep.") The crux of the parties' remaining dispute is whether Feldman or anyone else employed by Project MKULTRA administered psychoactive drugs to plaintiff without his consent on December 20, 1957, and if so, whether those drugs induced a psychotic episode that led to plaintiff attempted robbery of the Shady Grove Bar later that evening.

II. The Feldman Depositions

The misconduct that gives rise to plaintiffs sanctions motion centers around two depositions of Feldman taken by plaintiffs attorney. Plaintiffs counsel first deposed Feldman on July 30, 2002. At this first deposition, Feldman categorically denied

any involvement in administering LSD to plaintiff or anyone else. See Dep. dim Feldman at 36, 244-45, 288 (Feb. 7, 2004) (hereinafter "First Feldman Dep."). However, after new evidence surfaced linking Feldman to Project MKULTRA, the court permitted plaintiff's counsel to depose Feldman a second time. During this second deposition, on February 7, 2003, Feldman recanted his earlier denial of his involvement in Project MKULTRA and admitted that he participated in the program under George White's supervision. Second Feldman Dep. at 346-47, 360-63, 428-35. Feldman further admitted that he had been involved in drugging non-consenting victims with LSD. Id.

The United States now concedes that Feldman was involved in Project MKULTRA. However, the parties disagree as to the evidentiary weight that should assigned to a number of inconsistencies in Feldman's testimony. Three of these inconsistencies are of particular relevance to plaintiff's motion for sanctions. First, after initially testifying that he never personally administered LSD to unwitting victims, several of Feldman's responses to questions posed at his second deposition appear to contradict his prior assertion. See, e.g., id. at 428 (appearing to admit the he personally administered drugs and did follow-up investigations on the behavior of the victims in approximately ten to twelve instances). Second, at his February 2003 deposition, Feldman initially continued to maintain that he neither knew plaintiff in December 1957 nor attended the Christmas party where plaintiffs drugging allegedly occurred. See id. at 354-55. However, Feldman

subsequently appeared to contradict this statement when he implicitly referenced plaintiff's psychotic episode at several pints in his deposition. See id. at 360, 369, 428-29. Finally, and most significantly, Feldman at one point in the second deposition arguably admits to having personally administered LSD to plaintiff, directly contradicting a number of statements made at his first deposition. See Second Feldman Dep. at 428-29.

In Ritchie II, the court discussed these contradictions in Feldman's testimony at length. See 2004 WL 1161171, at *6-8. The court observed that "[t]he principal difficulty in evaluating plaintiffs motion for summary judgment on the issue of his LSD drugging here arises from the fact that the plaintiff and defendant rely most heavily upon the same witness [i.e., Feldman]."Id. at *6. Although the court went so far as to note that Feldman's testimony at his second deposition "appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge or consent," it also observed that "the statements that appear to implicate Feldman in Ritchie's alleged drugging do so only obliquely." Id. at *4, 6. Accordingly, the court concluded that "without a clear, categorical admission of involvement by Ira Feldman it is simply impossible for this court to conclude that no reasonable juror could find against plaintiff." Id. at *8. At the same time, the court held that Feldman's contradictory testimony raised triable issues of material fact related to the United States' liability. Id. The court therefore denied the parties' cross-motions for

summary judgment as to whether plaintiff "was an unwitting victim of CIA Subproject 42." Id.

Plaintiff now alleges a number of instances of sanctionable misconduct arising from Feldman's testimony at his first and second depositions and the United States' reliance upon portions of that testimony in pleadings and moving papers submitted to this court. Plaintiff first asserts that Assistant United States Attorney ("AUSA") Patricia Kennedy suborned perjury by preparing Feldman to testify falsely at this first deposition and by knowingly allowing his false testimony to remain uncorrected. Next, plaintiff alleges that in the course of examining Feldman at his second deposition, Kenney continued to suborn perjury by asking him to clarify whether he personally gave anyone LSD at bars. See Second Feldman Dep. at 472.[1] In addition, plaintiff seeks sanctions based on Kenney's repeated attempts to interrupt Feldman's testimony at his second deposition, arguing that her interjections were made with the intent of preventing Feldman from testifying truthfully regarding his involvement in administering drugs to plaintiff. See id. at 435-38.[2] Finally, plaintiff identifies a number of instances where the United States relied on Feldman's testimony in pleadings and papers submitted to this court,. including: (1) the United States' proffer of Feldman's alleged perjured declaration on March 2, 2002; (2) the denial of Feldman's involvement in administering psychoactive drugs to non-consenting individuals set forth in the United States' answer and amended answer to plaintiffs complaint; (3) the United States'

citation to false testimony given at Feldman's first deposition in its amended motion for summary judgment filed on September 16, 2002; and (4) citations to the same false testimony in the United States' November 7, 2003 opposition to plaintiffs motion for partial summary judgment. Plaintiff alleges that by knowingly relying on Feldman's perjured testimony, the United States committed fraud on the court in each of the above instances.

III. DEA's Failure to Comply with Plaintiff's Discovery Request

In addition to identifying the numerous instances of alleged misconduct related to Feldman's deposition testimony, plaintiff seeks sanctions based on the federal Drug Enforcement Agency's ("DEA's")[3] incomplete response to a discovery request that plaintiff propounded in September 2001. That request, as modified by the court's December 11, 2002 order to compel production of documents, required the DEA to name the witness most knowledgeable about documents relating to White and Feldman's involvement in Project MKULTRA and the DEA's investigation of that program that took place in the late 1970s. Order to Compel at 2 (Dec. 11, 2003). The request also sought production of documents related to MKULTRA and the subsequent DEA investigation. Id. at 2-3. In response to the court's order, Feldman's "Official Personnel File" ("OPF") was produced in February 2003, approximately six months after the date of Feldman's first deposition and more than a year

after plaintiff propounded his September 2001 discovery request, Plaintiff now argues that this delay was the product of bad faith on the part the DEA and its counsel, Ellen Harrison. Specifically, plaintiff contends that Harrison deliberately ailed to contact him (presumably through counsel) and obtain his social security number with the intent of preventing the DEA's Office of Personnel Management ("OPM") from locating Feldman's personnel file.

IV. Plaintiffs Requested Relief

Based on the allegations of misconduct relating to Feldman's testimony and the DEA's failure to produce his personnel file, plaintiff urges the court to impose sanctions on the United States pursuant to the court's inherent power to prevent abuse of the judicial process. Plaintiff argues that United States' misconduct amounts to "fraud on the court" and the appropriate remedy for this fraud is entry of judgment against the United States on the issue of liability. The court considers the merits of plaintiffs argument below.

LEGAL STANDARD

Federal courts are vested with the inherent power to impose sanctions to punish abuse of the judicial process. Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991); Metro Publ'g, Ltd. v. San Jose Mercury News, No. C 91-20605 SW, 1995 WL 232363, at *3 (N.D. Cal. Apr. 17, 1995) (Williams, J.). Pursuant to this inherent power, a district court

may enter default judgment against a party who fails to comply with pretrial discovery orders or interferes with the production of evidence. See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp. 982 F.2d 363, 368 (9th Cir. 1992). However, the court's inherent power to impose sanctions for inference with the judicial process "must be exercised with restraint and discretion." Chambers, 501 U.S. at 45. The Ninth Circuit has therefore "routinely insisted upon a finding of bad faith before sanctions may be imposed under the court's inherent power." Zambrano v. City of Tustin, 885 F.2d 1473, 1478 (9th Cir. 1989). If a district court determines that bad faith or willful misconduct has occurred, other factors to be considered before entry of default judgment include, the presence of "extraordinary circumstances," the efficacy of lesser sanctions, and "the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case." United States ex rel. Lujan v. Hughes Aircraft Co., 67 F,3d 242, 247 (9th Cir. 1995) (quoting Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988)), on remand, No. CIV-92-1282 SVW, 2000 WL 33775399 (C.D. Cal. Jan. 20, 2000), aff'd, 243 F.3d 1181 (9th Cir.), cert. denied, 534 U.S. 1040 (2001). In addition, the district court may consider the prejudice to the party victim of the misconduct and the government interests at stake. Id. (listing "optional considerations"). Ultimately, the imposition of such sanctions is left to the sound discretion of the court. See Anheuser-Busck Inc. v. Natural Beverages Distribs., 69 F.3d 337, 348 (9th Cir.1995) (citing Halaco Eng'g, 843 F.2d at 379).

DISCUSSION

Because plaintiff moves for sanctions pursuant to the inherent power of the court to prevent abuse of the judicial process, the court must first address the threshold issue of whether the United States acted in bad faith. See Zambrano, 885 F.2d at 1478. The court first addresses the allegations of bad faith misconduct related to Feldman's deposition testimony before turning to the DEA's failure to comply promptly with plaintiff's September 2001 discovery request.

I. The Feldman Depositions

Plaintiff first argues that the United States deliberately procured Ira Feldman's false testimony and relied upon that testimony in its submissions to the court, thereby perpetrating a "fraud on the court." If proven, plaintiff's allegations are sufficient to establish bad faith for the purpose of imposing sanctions under the court's inherent power. See, e.g, Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985). Plaintiff bears the burden of proving these allegations by - clear and convincing evidence. Phoceene Sous-Marine, S. A. v. United States Phosmarine Inc., 682 F.2d 802, 806 n.13 (9th Cir. 1982) (citing England v. Doyle, 281 F.2d 304 (9th Cir. 1960)).

A. Feldman's Prejury

Each of plaintiffs various allegations of fraud on the court ultimately traces back to the

contradictory and apparently perjured testimony of Ira Feldman. As noted above, Feldman's testimony at his first and second depositions was rife with contradictions concerning his involvement in Project MKULTRA. See generally supra, at 3. These mutually inconsistent statements provide ample evidence to support plaintiff's assertion that Feldman lied under oath. However, [p]erjury by a party or witness, by itself, is not normally fraud on the court." In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999) (citing Gleason v. Jandrucko, 860 F.2d 556, 559-60 (2d Cir. 1988)). Indeed,, because the effect of perjured testimony is to impair the witness' credibility, the Ninth Circuit has reasoned that despite the harm that deliberately giving false testimony can inflict upon the integrity of the judicial process, perjury is under most circumstances "an evil that could and should be exposed at trial." Id. at 1120 (citing Gleason, 860 F.2d at 560).

Nonetheless, in In re Levander, the Ninth Circuit recognized an exception to this rule. The case arose out of a motion by two Chapter 11 debtors to amend a bankruptcy court's order requiring an unsuccessful claimant in the bankruptcy proceeding to pay the debtors' attorneys' fees. Levander, 180 F.3d at 1116. The debtors argued that the perjured testimony of an officer of the claimant corporation allowed the corporation to conceal the existence of a partnership to which the corporation' assets had been conveyed. Id. at 1117-18. Accordingly, the Chapter 11 debtors sought to amend the order awarding attorneys' fees to designate the partnership as an additional judgment debtor. Id. at

1117-18. The bankruptcy court granted defendant's motion, concluding that the corporation's fraudulent conduct justified disturbing the finality of its previously entered judgment. Id. at 1118. The district court reversed, and the debtors appealed to the Ninth Circuit. Id. The Ninth Circuit held that the bankruptcy court had properly exercised its inherent power to prevent fraud on the court. Id. at 1120. While recognizing that the mere presentation of perjured testimony is not a basis for finding a fraud on the court, the court of appeals distinguished the case before it from this general rule on the ground that neither the court nor the debtors knew the partnership existed at the time that the hearing on attorneys' fees was held. Id. at 1119-20. Thus, unlike the more common situation where perjured testimony will be exposed at trial, there was no reason for any party to question the veracity of the witness' fraudulent representations. Id. at 1120. Thus, the court held that because the factfinding procedures of the bankruptcy court had been "defiled by the perjury," the corporation's fraud amounted to "fraud on the court." Id..

In short, Levander and the cases on which it relies stand for the proposition that perjured testimony amounts to fraud on the court where a witness' false statements "harm[] the integrity of the judicial process." Id. (quoting In re Intermagnetics Am., Inc., 926 F.2d 912, 917 (9th Cir. 1991)); see also Appling v. State Farm Mut. Auto Ins. Co. 340 F.3d 769, 780 (9th Cir. 2003) (observing that fraud on the court requires both a "grave miscarriage of justice and a fraud that is aimed at the court") (citations

omitted), cert. denied, ___ U.S. ____, 125 S. Ct. 90 (2004). In contrast, perjured testimony that "merely" prejudices an opposing party can generally be exposed at trial and this is not ordinarily a basis for entering default judgment in favor of the prejudiced party. Levander, 180 F.3d at 1120; Gleason, 860 F.2d at 560.

Applying this rule to the instant motion, the court finds that plaintiffs requested sanctions are not necessary to maintain the integrity of its factfinding procedures or to prevent a miscarriage of justice. As Ritchie II makes clears, the court is well aware of the damage done to Feldman's credibility by his obvious lack of candor under oath. See 2004 WL 1161171, at *7 n.7. The court, sitting as the trier of fact in this FTCA action, will weigh his testimony accordingly. Furthermore, having been allowed the opportunity to depose Feldman a second time in order to make use of newly discovered information linking Feldman to Project MKULTRA, plaintiffs counsel will once again have the opportunity to put Feldman's credibility to the test in open court. Thus, the situation that so concerned the Levander court-that neither the court nor the opposing party had any reason to question the veracity of a witness' testimony that was subsequently proven false-is simply not present here. The court therefore concludes that the falsity of Feldman's testimony cannot by itself be a basis for entry of default judgment against the United States.

B. Subornation of Perjury

Despite the general rule against imposing sanctions against a party based on the presentation of perjured testimony, the main thrust of plaintiff's argument is admittedly distinguishable from the Levander case in that it focuses on counsel's collusion with Feldman for the purpose of presenting false testimony. In the Ninth Circuit, courts have inherent power to dismiss an action or enter default judgment "when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." Fjelstad, 762 F.2d at 1338 (quoting Wyle v. R.J. Reynolds Indus., Inc. 709 F.2d 585, 589 (9th Cir. 1983)). However, "[d]ue process limits the imposition of the severe sanctions of dismissal or default to 'extreme circumstances' in which "the deception relates to the matters in controversy' and prevents their imposition 'merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." Id. (quoting Wyle, 709 F.2d at 589, 591).

Here, plaintiff asserts that AUSA Patricia Kenney conspired with Ira Feldman to procure his perjured deposition testimony and deliberately encouraged him to lie during his depositions. As noted above, plaintiffs examination of Feldman at his second deposition clearly revealed a number of instances where Feldman's candor under oath was (to put it mildly) questionable. However, while the contradictions in Feldman's testimony severely impair the credibility of his testimony, these

contradictions have been disclosed to the court and can be further explored by plaintiffs counsel at trial. Accordingly nothing in Feldman's false testimony-deliberately procured or otherwise-"threaten[s] to interfere with the rightful decision" of the instant case. Accord Fielstad, 762 F.2d at 1338. Thus, entry of default judgment is not an appropriate remedy for any misconduct that may have been committed by the United States.

In any event, the fact that portions of Feldman's testimony were indeed false, while undisputed, is not by itself sufficient to justify imposing sanctions on the United States pursuant to the court's inherent power. Rather, plaintiff must prove not only that Kenney presented testimony that was in fact false, but also that she knew that Feldman was committing perjury before his depositions were taken. See id. Again, plaintiff bears the burden of proving these allegations by clear and convincing evidence. Phoceene Sous-Marine, 682 F.2d at 806 n.13. In attempting to meet this burden, plaintiff relies on several interviews documenting Feldman's involvement in Project MKULTRA, on an article that appeared in Spin magazine in March 1994, and on a passage of a book written by John Marks, The CIA and Mind Control: The Search for the Manchurian Candidate. See Feldman Decl., Exhs. 1, 2, 9, 11. As the United States points out, Kenney was under no obligation to assume these unswom statements to be true before undertaking an investigation of plaintiff's claims. Plaintiff nonetheless contends that Kenney "must have" known that Feldman's testimony was false before he

testified at his first and second depositions, Pl' Mem P. & A. at 14, and that she compounded her failure to correct Feldman's false statements by actively encouraging him to give additional false testimony. As to the former allegation, plaintiffs assertion that the government knew that Feldman personally administered drugs to plaintiff or any other non-consenting victim of Project MKULTRA is based on sheer speculation. The United States also cites evidence to support its denial of having prior knowledge of Feldman's involvement in MKULTRA, asserting that it based this conclusion on an October 1979 CIA report that found no known connection between Feldman and the CIA. Def's Opp'n at 12 & Exh. 2. Although the United States' conclusion was subsequently proven false by facts disclosed in discovery and may have been somewhat suspect even at the time that it was made, the various interviews and print sources referenced in plaintiffs motion are not by themselves sufficient to establish that the United States acted in bad faith. The court therefore finds that plaintiff has not met his burden of proof on this issue.

Plaintiff's assertion that counsel for the United States deliberately encouraged Feldman to lie rests on an equally tenuous foundation. Aside from the aforementioned (and again unsubstantiated) assertion that Kenney "must have" known that Feldman's testimony at his first deposition was false, plaintiffs only support for this theory comes from Kenney's redirect examination of Feldman at his second deposition. After Feldman appeared to admit to his personal involvement in

drugging at least ten to twelve people in his responses to several questions from plaintiff's counsel, Kenney attempted to clarify this testimony, asking him whether he ever personally went to a bar and put LSD in someone else's drink. Second Feldman Dep. at 472, 477-78. Feldman answered that he did not. Id, Plaintiff portrays this as an attempt to suborn perjury, citing several examples of Feldman's testimony at his second deposition that appear to contradict this denial.[4] However, plaintiffs view suggests a certainty in Feldman's admissions that is not reflected in the record. Indeed, in responding to questions from plaintiffs counsel, Feldman exhibited an unfortunate tendency to vacillate between first-person singular, first-person plural, and even second-person pronouns in discussing his involvement in the drugging of human subjects, leaving significant ambiguity regarding the extent of Feldman's personal involvement in administering psychoactive drugs to non-consenting individuals.[5] This tendency went uncorrected by plaintiffs counsel. Thus, in the absence of evidence that Kenney had colluded with Feldman to procure his false testimony on the subject, there was nothing improper about Kenny's attempt to clarify this ambiguity. The court therefore finds that plaintiff has failed to meet his burden of proving by clear and convincing evidence that Kenney suborned perjury at either of Feldman's depositions.

C. Misleading the Court

Plaintiff next asserts the United States has improperly relied on Feldman's perjured testimony in its pleadings and other filings with the court. A district court may in its discretion award sanctions for the filing of "false or frivolous pleadings" or other papers pursuant to Federal Rule of Civil Procedure 11 as well as pursuant to the court's inherent power to prevent abuse of the judicial process. Chambers, 501 U.S. at 50-51. Although courts should generally seek to avoid relying on their inherent powers to punish conduct that is addressed by specific procedural rules, see Fjestad, 762 F.2d at 1338, the Ninth Circuit has held that reliance on a court's inherent power is appropriate where "the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address." Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (quoting Chambers, 501 U.S. at 51). Here, while the alleged instances of filing false pleadings could be addressed under Rule 11, these allegations are closely related to the alleged misconduct arising out of the Feldman depositions, which falls outside the scope of the rule's specific prohibitions. Accordingly, the court, following plaintiffs lead, focuses on allegations of bad faith misconduct that would, if proven, permit the cow to impose sanctions on the United States pursuant to its inherent power. See In re DeVille 361 F.3d 539, 548 (9th Cir. 2004) (comparing bad faith requirement for impose sanctions pursuant to a

court's inherent power with the "objectively unreasonable conduct" standard of Rule 11).

Plaintiff first identifies several averments that were included in the United States' answer and amended answer. Specifically, plaintiff points out that despite evidence to the contrary, both the answer and the amended answer deny Feldman's involvement in the "planning, design, and execution" of Project MKULTRA. Pl.'s Compl. ¶¶ 7, 9; Def.'s Answer ¶¶ 7, 9; Def. Am. Answer ¶¶ 7, 9. There is now no doubt that the averments contained in plaintiff's answer are in fact false. Both parties concede that Feldman participated in Project MKULTRA and that, at a minimum, Feldman aided and abetted in the testing of psychoactive drugs on non-consenting victims. However, plaintiff once again fails to submit any non-speculative evidence that the United States knew the averments in its answer and amended answer to be false at that time that the pleadings were filed - i.e., on March 2, 2001, and June 6, 2001, respectively. A statement that the United States "must have known" that Feldman participated in Project MKULTRA based solely on a combination of the aforementioned hearsay sources and plaintiff's unsubstantiated assertions hardly amounts to clear and convincing evidence of bad faith. Thus, the court must reject plaintiffs attempt to seek sanctions based on the averments set forth in the United States' pleadings.

Plaintiff makes a similar argument with respect to the amended motion for summary judgment that the United States filed on September 16, 2002. In that motion, the United States cited

passages from Feldman's first deposition in which he testified that he (1) did not attend the Christmas party at the Post Office Building in December 1957; (2) had never slipped LSD into anyone's drink or had conversations with George White about doing so; and (3) had no knowledge that White was testing drugs on human beings. Def's Am. Mot. S.J. at 2-3 (Sept. 16, 2002). Plaintiff argues that the United States deliberately misled the court by including these factual contentions in its motion with knowledge of their falsity. As for the first two contentions, the evidence presented in this court has yet to prove either statement to be unequivocally false. The court refuses to presume that the United States had knowledge of their falsity in September 2002 when the court itself has not resolved disputes of material fact regarding these issues more than two years later. As to the third statement, it is true that Feldman's testimony at his second deposition convincingly established that he participated in Project MKULTRA under White's supervision. However, the United States made this allegedly fraudulent representation approximately six months before this second deposition was taken In the absence of any evidence in the record suggesting that the United States actually knew the statement to be false in September of 2002, the court again refuses to engage in speculation regarding what the United States "must have known" at that time.

The factual premise of plaintiff's next allegation, the United States' proffer of Feldman's declaration on July 30, 2001, is even more tenuous. The declaration carefully avoids any mention of

Feldman's participation in Project MKULTRA (or lack thereof) and instead focuses narrowly on Feldman's assertions that he did not attend the Christmas party at the Post Office Building and that he "d[id] not recall knowing anyone by the name of Wayne A. Ritchie." Benson Decl., Exh. 8 ¶14 (Declaration of Ira C. Feldman). As the court observed in Ritchie II, Feldman's testimony at his second deposition certainly casts doubt on the credibility of this denial. 2004 WL 1161171, at *6. However, in light of the "oblique[]" nature of the statements inculpating Feldman in Ritchie's drugging, the court concluded that it remained unclear whether reference to plaintiff's robbery triggered an unconscious admission or merely induced Feldman to offer a needless and unfortunate comparison." Id. Thus, the court concluded that "it is inescapable that other explanations beyond Feldman's guilt explain his remarks." Id. In adjudicating this motion, the court cannot, hold counsel for the United States to a higher standard than it sets for itself in determining whether a material fact remains in dispute for the purpose of summary judgment. Indeed, it is understandable the United States chose to resolve these factual disputes in its favor in July 2001 Accordingly, the court finds no basis for awarding sanctions based on the statements contained in Feldman's declaration.

Finally, plaintiff accuses the United States of knowingly citing Feldman false testimony in its opposition to plaintiff's motion for summary judgment filed on November 7, 2003, arguing that the government's opposition improperly relied on

testimony given at Feldman's first deposition. The specific statements cited by plaintiff involves Feldman's testimony regarding (1) whether he read a newspaper article about plaintiff's attempted robbery that appeared in the San Jose Mercury News two days of after the alleged doping incident and (2) whether Feldman knew plaintiff at the time of the robbery. See Def.'s Opp'n Mot. S.J. at 4, 8-9 (Nov. 7, 2003). In support of these allegations, plaintiff relies on a single statement in Feldman's second deposition where he appears to concede that he read the aforementioned newspaper article at the time of its publication. Second Feldman Dep. at 360 ("We didn't know about [Feldman's robbery] for months, until the San Jose paper came out."). Of course, there are numerous other passages in Feldman's testimony that directly contradict this statement. See e.g., First Feldman Dep. at 245-46; second Feldman Dep. at 354-55.[6] The United States' opposition does little more than call these contradictions to the court's attention. Such conduct can hardly be considered improper where a party seeks to establish a disputed issue of material fact for the purposes of opposition a motion for summary judgment. The court recognized as much in Ritchie II, concluding that "[d]espite the vagaries of Feldman's responses," Feldman's involvement in Ritchie's drugging remained "an issue about which reasonable jurors might well disagree." 2004 WL 1161171, *8. The court's conclusion applies with equal force to the beliefs of counsel for the United States. Thus, the court declines to award sanctions on this bases.

D. Interference with Taking of Feldman's of Second Deposition

In his final allegation of misconduct arising out of Feldman's deposition testimony, plaintiff asserts that AUSA Patricia Kenney intentionally obstructed the examination conducted by his counsel during Feldman's February 2003 deposition. Plaintiff again seeks sanctions pursuant to the court's inherent power to prevent abuse of the judicial process. Although the Federal Rules of Civil Procedure authorize sanctions for certain discovery-related misconduct, it is well-settled that courts retain inherent power "to impose sanctions for discovery abuses that may not be a technical violation of the discovery rules." Halaco, 843 F.2d at 380; see also Anheuser-Busch, 69 F.3d at 348 (collecting cases). However, regardless of the source of the court's authority, the severe sanction of entry of default judgment against the offending party is justified only in "extreme circumstances" and should be imposed only when necessary "to insure the orderly administration of justice and the integrity of the court's orders." Halaco, 843 F.2d at 380 (citing Wyle, 709 F.2d at 589; United States v. National Med. Enters., Inc., 792 F.2d 906, 910 (9th Cir.1986)); see also Fjelstad, 762 F.2d at 1338.

Plaintiff urges the court to sanction the United States for Kenney's repeated attempts to interrupt the examination of Feldman by plaintiffs counsel during his second deposition. This court has already concluded that the "obdurate behavior" of Patricia Kenney "may well have denied plaintiff the

opportunity to solicit further valuable testimony." Ritchie II, 2004 WI, 1161 171, at *7 n.6. Nonetheless, the court finds that plaintiff's sought-after remedy-entry of judgment against the United States as to liability-is grossly out of proportion to the harm that Kenney's behavior inflicted on the integrity of the judicial process. Indeed, at trial, plaintiffs counsel will have the opportunity to ask the follow-up questions that Feldman managed to evade as a consequence of Kenney's misconduct. Moreover, even if the court were to strike the portions of the United States' answer denying that Feldman administered drugs to plaintiff, plaintiff would still bear the burden of proving causation. Although Kenney's conduct was certainly unprofessional, the court refuses to permit plaintiff to use her behavior as an excuse to avoid its obligation to prove its *prima facie* claim for relief by presenting evidence at trial. The court therefore concludes that despite Kenney's obstreperous conduct, it would be an abuse of discretion to enter default judgment against the United States on the issue of liability.

However, the court has discretion to fashion a remedy that is more closely proportionate to the gravity of Kenney's misconduct. In particular, Federal Rule of Civil Procedure 30(d)(3) provides that the court may impose an "appropriate sanction" on any person responsible for "any impediment, delay, or other conduct [that] has frustrated the fair examination of deponent." Fed. R. Civ. P. 30(d)(3). Such sanctions may include "costs and attorneys' fees incurred by any of the parties as a result [of the

obstructionist conduct]." Id.; see also Castillo v. St. Paul Fire & Mar. Ins. Co., 938 F.2d 776, 779 (7th Cir. 1991) (upholding award of attorneys' fees to opposing based on counsel's "repetitious obstructive tactics" at disposition). Here, Kenney repeatedly interrupted the examination of Feldman by plaintiff's counsel without the benefit of an objection. Whether this in fact prevented plaintiff's counsel from soliciting testimony that would directly inculpate Feldman in plaintiff's drugging is a question that remains unanswered. Nonetheless, Kenney denied plaintiff's counsel that opportunity to attempt to solicit such testimony. The court finds this conduct to be sanctionable under Rule 30(d)(3).

As noted above, sanctions under Rule 30(d)(3) generally take the form of attorneys' fees and costs incurred as a result of the sanctionable conduct. See, e.g., Castillo, 938 F.2d at 779. Admittedly, the costs that plaintiff incurred as a result of Kenney's misconduct in the instant action are highly uncertain. It is possible that Feldman could have made an admission of guilt that was sufficiently convincing so as to justify entry of summary judgment on that issue. On the other hand, pressing on with the examination may have revealed nothing further about Feldman's involvement in plaintiffs drugging. Certainly Kenney's obstructionist tactics interfered with the flow of the deposition and the ability to obtain clear coherent answers. Much of those tactics also afforded the opportunity to signal or slant the answers, thus distorting the statements of the deponent. Courts have an obligation to protect the discovery process to ensure it does not mislead

the opposing party or the court and that it does not obfuscate the truth. In light of the uncertainty occasioned by Kenney's tactics, the court finds that an award of reasonable costs and attorneys' fees that plaintiff incurred in taking Feldman's second deposition best reflects the gravity of Kenney's misconduct and the extent to which plaintiff was prejudiced by it. The court therefore orders Kenney and the United States to each pay one-half of this amount to plaintiff.

II. Failure to Obtain Felman's Social Security Number

Plaintiff's remaining allegations of misconduct relate to the DEA's incomplete response to plaintiff's September 2001, request for production of documents. Specifically, plaintiff contends that the DEA and its attorney, Ellen Harrison, failed to produce Feldman's personnel file in a timely fashion, and moreover, that they did so with the intent of concealing the "embarrassing" contents of the file. Under Federal Rule of Civil Procedure 37(b)(2), a district court may impose a range of sanctions against a party who "fails to obey an order to provide or permit discovery," including an order "rendering a judgment by default against the disobedient party." Fed. R Civ. P. 37(b)(2)(C). The court also retains the inherent power to sanction litigants who abuse the discovery process. Regardless of the source of the court's authority, the Ninth Circuit applies the aforementioned "extreme circumstances" test in determining whether entry of default judgment in an

appropriate sanction for discovery-related misconduct. United States ex rel. Wiltec Guam v. Kahaluu Constr. Co., 857 F.2d 600,603 n.5 (9th Cir. 1988) (using "use both types of cases interchangeably" for purpose of reviewing order granting default judgment). However, unlike sanctions under the court's inherent power, Rule 37 sanctions are not available in the absence of a court order compelling discovery. Fed. R. Civ. P. 37(b); see id. at 602-03.

Because the bulk of the DEA's allegedly sanctionable misconduct occurred before the court issued an order compelling production of Feldman's personnel records on December 11, 2002, the court's power to sanction the DEA rests primarily on its inherent authority to prevent abuse of the judicial process. See Wiltec Guam, 857 F.2d at 602-603. Thus, the issue is once again whether the United States - in this instance represented by the DEA and its attorney, Ellen Harrison - deliberately obstructed plaintiff's attempts to conduct discovery. Specifically, plaintiff seeks to prove that Harrison remained willfully ignorant of Feldman's social security number, thereby preventing the DEA from locating his personnel file and disclosing documents related to an internal Bureau of Narcotics investigation in which he was found to have lied under oath. However, based on Harrison's uncontroverted testimony, the DEA's Office of Personnel Management neither required nor routinely requested a former employee's social security number before processing a request for a personnel file. Dep. of Ellen Harrison at 105-07 (Apr. 4, 2003)

(hereinafter "Harrison Dep."). Harrison further testified that she initially followed the DEA's "routine" procedure for requesting Feldman's file. Id. Plaintiff correctly observes that this routine procedure resulted in unnecessary delays in obtaining documents in the DEA's possession, and this court recognized as much in granting plaintiff's motion to compel their production. However, there is no need to resort to allegations of subterfuge to explain the inability of an arm of the federal bureaucracy to respond to plaintiffs request in a timely manner. Inefficiency and incompetence are at least as likely to be the root cause of the delays experienced by plaintiff. While unfortunate, such delays are hardly evidence of Harrison's bad faith.

Furthermore, there is no serious dispute that Harrison responded to the court's December 2002 order to compel with reasonable diligence. Upon issuance of the order, Harrison undertook an inquiry that she characterized as "above and beyond [DEA's] standard procedures' in order to obtain Feldman's OPF. Harrison Dep. at 110. As a result of Harrison's efforts, plaintiff's counsel received Feldman's personnel file prior to February 7, 2003, enabling him to review its contents in preparation for Feldman's second deposition, thereby any serious prejudice to plaintiff. Thus, while it may be true that the DEA acted unreasonably in taking almost eighteen months to respond to plaintiffs September 2001 discovery request, such unreasonable conduct cannot by itself cannot justify the severe sanctions that plaintiff now seeks to impose on the United

States. Accordingly, the court must deny plaintiffs request for sanctions on this ground.

CONCLUSION

For the reasons stated above, plaintiff's motion for sanctions against the United States pursuant to the inherent power of the court is DENIED.[7] The court ORDERS that sanctions be imposed against the United States and Patricia Kenney pursuant to Federal Rule of Civil Procedure 30(03). The United States and Kenney are ORDERED to each pay one-half of the amount of reasonable costs and attorneys' fees incurred by plaintiff in taking Ira Feldman's deposition on February 7, 2003. The parties shall meet and confer by March 2, 2005 in order to attempt to resolve any disputes regarding the amount of reasonable costs and attorneys' fees to which plaintiff is entitled. The parties shall submit a joint statement setting forth any unresolved disputes as to the amount of costs and attorneys' fees no later-than March 9, 2005.

IT IS SO ORDERED.

DATED: January 5, 2005

/S/
Marilyn Hall Patel
District Judge

ENDNOTES

1. Specifically, when asked whether he ever took a vial of LSD to a bar and put it someone else's drink, Feldman answered: "No, I never did it myself. I always gave it to other people." Second Feldman Dep. at 472. Kenney later asked Feldman if he was referring to himself as having tested drugs in bars when he testified that "we tested those drugs in bars," to which Feldman responded: "Not personally involved, no." Id. at 477-78.

2. The most notable interruption occurred at the following point in Feldman's second deposition, where he appeared to be implicating himself in plaintiffs drugging:

A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone. And then he waits -

MS. KENNY [defendant's counsel]: Mr. Feldman
MR. BENDER [plaintiffs counsel]: He is answering the question. I object to your doing that at a critical time like this. You have some nerve to interrupt that witness now. That's horrible.
MS. KENNY: He appears to be spacing out.
MR. BENDER: He is not spacing out. You may be spacing out because of the testimony he is giving.
MS. KENNY: The video will show it.

MR. BENDER: It sure will.
MS. KENNEY: Go ahead.
MR. BENDER: Will you pick up where he left off? Will you read it to him?
MS. KENNEY: We have been sitting here since -
MR. BENDER: We are in the middle of an answer
MS. KENNEY: We have been sitting here since 1 o'clock this afternoon. At a convenient time we will take a break.
MR. BENDER: We had a break MS. KENNEY: You tell me when it is convenient. But sometime between now and 4:00.
MR. BENDER: Who do you think you are, to interrupt this witness like that at a critical time? You know what you are doing.
MS. KENNEY: Excuse me. I don't agree with you that it is at a critical time.
MR. BENDER: You know. That is why you did it.
MS. KENNEY: I don't agree with you.
MR. BENDER: Of course you don't.
MS. KENNEY: Do you want the reporter to read it back?
MR. BENDER: Please give him his answer as he is giving it. (Record read)
Q. Do you want to continue?
A. No. That's it. That's all I remember.
Q. Can you give us some instances, when you were working with White, about who should be drugged?
A. No. I couldn't give you any instances at all.
MR. BENDER: Okay. Let's take a break.

Second Feldman Dep. at 435-38.

3. The DEA assumed the responsibilities of the former Bureau of Narcotics upon its creation in 1973. Drug Enforcement Administration; The History of the DEA from 1973 to 1998 (1998), available at http:www.dea.gov/pubs/history/deahistory_01.htm#1 (last visited Dec. 10, 2004).

4. On the other hand, Kenney's questions specifically asked plaintiff (sic) whether he had ever personally administered LSD to a person in a bar. See note 1, supra. Because plaintiff alleges that he was drugged at the Post Office Building rather than in a bar, it is possible that a finder of fact could conclude that Feldman's answers to Kenney's questions were truthful but nonetheless find that Feldman drugged plaintiff in the manner that has been alleged in the complaint.

5. See, e.g., Second Feldman Dep. at 361 (noting that "we knew" the identity of persons to whom LSD was being administered); id. at 428 ("I drugged guys involved in about ten, twelve, period.")' id. at 361 (answering in response to a question about how he administered LSD, that "you would either cut off the top or you would bite....off the top of a small ampule).

6. The fact that Feldman incorrectly testifies that the article in the "San Jose paper" came out "months" after plaintiffs arrest also suggests that his recollection of an event that occurred almost 50

years ago was understandably incomplete at the time that his deposition was taken:

7. Because the court denies plaintiffs motion for sanctions on other grounds, it need not address the United States' argument that Federal Rule of Civil Procedure 55(c) limits the court's inherent power to enter default judgment against the federal government under the present circumstances. In addition, the United States' motion to strike plaintiffs proposed order with proposed findings of facts and conclusions of law is DENIED as moot.

United States District Court,
N.D. California,
Wayne A. **RITCHIE**, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.
No. C 00-03940 MHP.

May 24, 2004.

Robert E. Cartwright, Kent L. Klaudt, Cartwright & Alexander LLP, San Francisco, CA, Sidney Bender, Risa Bender, Leventritt, Lewittes & Bender, New York, NY, for Plaintiff.

Robert S. Mueller, III, Susan L. Kamlet, Patricia J. Kenney, U.S. Attorney's Office, San Francisco, CA, Jocelyn Burton, U.S. Attorney's Office, Oakland, CA, for Defendants.

MEMORANDUM & ORDER

Plaintiffs Motion for Summary Judgment

PATEL, Chief J.

Plaintiff Wayne Ritchie has alleged in this action that the Central Intelligence Agency and the Bureau of Narcotics tested psychoactive drugs on unknowing and unwitting American citizens including plaintiff during the 1950s, and that this non-consensual testing drove plaintiff to commit an armed robbery on December 20, 1957. Plaintiff initially filed claims against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*, ("FTCA"), and against Robert V. Lashbrook and Ira Feldman under the First, Fourth, Fifth and Eighth Amendments to the United States

Constitution. Plaintiff sought twelve-million dollars in compensatory damages, as well as costs and attorneys' fees.

The court previously dismissed plaintiff's constitutional claims, but has allowed plaintiff to proceed under the FTCA. Now before the court are plaintiff and defendant's cross-motions for summary judgment. Defendant has filed for complete summary judgment on the issue of causation, arguing that plaintiff cannot prove that he was administered lysergic acid diethylamide (LSD) by the United States government in 1957, and that even assuming that he had been dosed with LSD, he cannot prove that the SD caused him to commit the armed robbery that gave rise to this action. Plaintiff has moved for summary judgment on the particular issue of whether "Wayne Ritchie was an unwitting LSD victim of CIA Subproject 42."[1] Having

[1] Neither defendant nor plaintiff has been entirely clear regarding the issues they have asked the court to decide on summary judgment. As noted above, plaintiff has requested summary judgment simply on the question of whether Ritchie was "an unwitting victim of CIA Subproject 42," while defendant has requested summary judgment on the issue of "causation." Defendant appears to contest what might be considered both parts of the causation question--whether Ritchie can show that he was actually administered LSD, and whether he can demonstrate further that this LSD caused him to attempt an armed robbery. Plaintiff's summary judgment motion is somewhat less clear, but it appears to focus primarily upon the question of whether he was ever actually dosed with the drug, not whether his subsequent behavior is attributable to that dosing. (Plaintiffs opposition brief seems to incorporate this second question in addition, but that fact is irrelevant.

considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

As explained in this court's July 1, 2002, Memorandum and Order, plaintiff, a former Deputy United States Marshal, alleges that he was unwittingly given food or drinks that were laced with lysergic acid diethylamide (LSD) or another psychoactive drug while he was attending a holiday party in the United States Post Office Building on December 20, 1957. Compl.¶ 12. According to plaintiff's uncontradicted declaration, Ritchie first arrived at his office's Christmas party at approximately noon on December 20, 1957. Ritchie Dec. ¶ 5. He drank a single bourbon and soda and returned to his office shortly thereafter. *Id.* Two hours later, Ritchie re-entered the party and consumed three or four more drinks. *Id.* at 6. Plaintiff then began to feel paranoid and imagined that his fellow officers and co-workers had turned against him. *Id.* at 7. He left work, returned home briefly, and then visited four bars, where he consumed a total of two more drinks. *Id.* at 7- 9. Still fueled by paranoia, plaintiff then resolved to hold up

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Plaintiff cannot introduce new issues to be decided in his responsive pleadings.) As a result, this court will assume that defendant has filed a motion for summary judgment on both causation questions, and that plaintiff has filed a motion for summary judgment only with regard to whether the CIA administered him LSD.

a bar and returned to his office where he took two revolvers from his personal locker. *Id.* at 9-10. He entered a fifth bar, had one drink, and then drew a weapon and demanded money. *Id.* at 10. Someone knocked Ritchie unconscious, and he was subsequently arrested. *Id.* at 10-1 1.

Plaintiff alleges that he was a victim of a federal program, called "MKULTRA," dedicated to the research and development of drugs, including LSD, that might be used to alter human behavior. Compl. ¶¶ 18 & 26. Plaintiff maintains that he "first suspected that he might have been surreptitiously drugged" when he read the obituary of Dr. Stanley Gottlieb, a former CIA agent implicated in that agency's mind-control program, in the newspaper on March 15, 1999. Compl. ¶ 23. He found additional support for his suspicion in April 1999 when he read a diary entry of George White, an agent of the Bureau of Narcotics and allegedly the operating head of the CIA'S "mind-altering program" in San Francisco. See Compl. ¶ 24; Ritchie Dep., Exh. B-12 (White was a senior employee at the San Francisco Federal Narcotics Bureau in the 1950s). White's December 20, 1957, diary entry stated, in part, "xmas party Fed bldg Press Room." Ritchie Dep., Exh. D; Compl. ¶ 25.[2] [FN2] White was an MKULTRA subcontractor from approximately 1953 until 1964. McGinn Dec. ¶ 5. In that role, he established a safehouse apartment in San Francisco where drug tests were conducted on drug informants

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[2] The full entry reads: "home flu-xmas party Fed bldg Press Room." Ritchie Dep. Exh. D.

and prostitutes. *Id.* Defendant has also produced an extensive record of newspaper and television coverage documenting federal mind-control experimentation. *Id.*, Exhs. A-C (newspaper articles) & X (books).

Today, neither party disputes that MKULTRA existed, and that Ira Feldman and George White were engaged in the involuntary drugging of unwitting suspects in San Francisco on behalf of the CIA. *See generally* 2nd Feldman Dec. Both sides agree further that plaintiff suffered a brief psychotic episode on the night of December 20, 1957, that resulted in his attempted robbery of the Shady Grove Bar. *See, e.g.*, Gottlieb Rep., at 17 ("Brief Psychotic Disorder on December 20 19957"); Ketchum Rep., at 10 ("It is certainly appropriate....to regard Wayne's episode as a temporary psychotic disorder."). These cross-motions for summary judgment concern the particular questions of whether Wayne Ritchie was himself a victim of the CIA's MKULTRA program, and whether Ritchie can establish that this alleged drugging with LSD was the cause of his psychotic episode.

LEGAL STANDARD

Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct.

2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The moving party for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. *Id.*; *see also Gasaway v. Northwestern Mut. Life Ins. Co.*. 26 F.3d 957, 960 (9th Cir. 1994). he court may not make credibility determinations, *Anderson*, 477 U.S. at 249, and inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520, 111 S.Ct. 2419,115 L.Ed.2d 447 (1991).

DISCUSSION

I. *Admission of the Levy and Loftus Declarations*

At a case management conference held on November 5, 2003, defendant's counsel announced

that she had filed Rule 26 reports for two additional expert witnesses, Dr. Mark I. Levy, M.D., and Dr. Elizabeth F. Loftus, Ph.D., within the past two days, and that she intended to rely upon the testimony of these two experts in her motion for summary judgment. Defendant had already long since filed Rule 26 reports for two other expert witnesses, and plaintiff had been afforded the opportunity to depose these witnesses. In light of the fact that this case is approximately three years old, and the fact that cross-motions for summary judgment have long been anticipated, the court noted that it did not look favorably upon the eleventh-hour introduction of defendant's third and fourth experts.[3] Nonetheless, the court stated that it would allow defendant to submit a declaration describing the necessity of having the court consider the declarations of Dr. Levy and Dr. Loftus, and might allow said testimony into the record were such necessity well established.

Defendant's counsel has failed to provide any reasonable argument that Dr. Levy and Dr. Loftus are essential to the proper resolution of these motions for summary judgment. In its proffer of their testimony, defendant merely restates its spurious claim that no deadlines existed in this case for the filing of expert reports and that defendant only became aware of the existence of these experts

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[3] In support of his motion for summary judgment and in opposition to defendant's, plaintiff has proffered one expert witness, Dr. James S. Ketchum, M.D. Dr. Ketchum's expert declaration was filed in 2002, and defendant subsequently deposed Dr. Ketchum.

in September 2003. These assertions elide the fundamental points of timeliness at issue here, namely that this case is already several years old, and that plaintiff had already filed a motion for summary judgment *before* defendant filed reports of its third and fourth experts. Reasonable diligence on the part of defendant's counsel would have brought these experts to the fore much earlier--the issues about which these individuals opine are not new, only the experts themselves are. Before this court could consider these two new experts in the context of this motion for summary judgment, it would be necessary to allow plaintiffs to depose them both and submit an updated declaration from plaintiff's own expert in response. These steps would likely occasion an additional delay in these proceedings of several months, if not more. Defendant has failed to offer any particularized explanation regarding the importance of the opinions offered by Dr. Levy and Dr. Loftus, or any reason that this court should agree to further postpone consideration of the parties' long-awaited motions for summary judgment on their or defendant's behalf. By consequence, the court declines to consider the declarations of Dr. Levy and Dr. Loftus in conjunction with these motions.[4]

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[4] Defendant asserts with some vehemence that neither expert's testimony would be redundant or cumulative in view of the two experts already proffered by defendant. While this asseveration indeed appears to be correct, Dr. Levy's testimony is instead, quite ironically, contradictory to that of Dr. Abraham and Dr. Gottlieb. Dr. Abraham and Dr. Gottlieb both concluded, on the basis of available evidence, that Ritchie's psychotic episode was

II. *Ritchie as Unwilling LSD Victim*

A. *Plaintiff's Principal Proffered Facts*

1. *Direct Evidence*

In Support of his motion for summary judgment on the issue of whether he was administered LSD unwittingly pursuant to CIA Suproject 42, Ritchie relies upon the confluence of several different pieces of evidence. The most important evidence, and the only direct indication that he may have been drugged, is the deposition testimony of Ira Feldman, a supervisory group head at the Federal Bureau of Narcotics (FBN), who worked under George White and Dr. Sidney Gottlieb (another CIA employee) on the MKULTRA project. Plaintiff first deposed Feldman on July 30, 2002; when further evidence linking Feldman to Project MKULTRA subsequently came to light this court permitted plaintiff to depose Feldman a second time.

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more likely caused by alcohol than by ingestion of LSD. Dr. Levy, on the other hand, opines that "there is no known scientific method by which, retrospectively, 47 years after the fact, an accurate determination can be made as to whether the brief psychotic episode allegedly experienced by Mr. Ritchie on December 20, 1947, [sic] was caused by Mr. Ritchie's admitted contemporaneous heavy use of alcohol as opposed to his having been surreptitiously drugged with LSD or some other hallucinogenic agent." Levy Decl.¶ 2. While this approach does add another potential basis according to which this court could find in favor of defendant, it simultaneously serves to undermine the arguments which defendants other experts had advanced with such certainty.

During this second deposition, taken on February 7, 2003, Feldman appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge or consent. Feldman gives this indication three times, though each reference is somewhat oblique. First, he states: "I drugged guys involved in about ten, twelve, period. [sic] I didn't do any follow-up, period, because it wasn't a very good thing to go and say "How do you feel today? "You don't give them a tip. *You just back away and let them worry like this nitwit, Ritchie.*" 2nd Feldman Dep., at 428 (emphasis added). Following that statement, Feldman engaged in a colloquy with plaintiff's counsel in which he appeared to inculpate himself in Ritchie's drugging a second time:

> Q. When you say "let them worry," you mean let them have a full head of LSD and let--
>
> A. Let them have a full head, like what happened, like what happened *with this nut when he got out and got drunk.*
>
> *Id.* at 428-29 (emphasis added).

Later, Feldman was asked if he were essentially "deciding who was going to suffer," and implicitly referenced Ritchie a third time, replying that

> I didn't say anybody had suffered. I didn't say anybody suffered. *The bird, like this guy, who saw snakes coming out, he deserved to suffer.*

> *He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone.*

Id. at 435 (emphasis added). Feldman further explained that the LSD testing was undertaken in order to explore that drug's potential use "[b]oth in interrogation and in provoking erratic behavior." *Id.* at 369-70.

2. *Circumstantial Evidence*

Plaintiff also points to George White's diary entry from December 20, 1957, as further evidence that he had been unwittingly dosed with LSD. Feldman testified at his deposition that he would inform George White of his activities for MKULTRA, and that White exercised some degree of operational control over Feldman's activities. Explained Feldman, "When it [the LSD drugging] was done, and I got a report, I wrote it up and gave it to White, and I have no idea what White did with that report." *Id*, at 432. White's diary for December 20, 1957, notes that he was home with the flu but references a Christmas party in the Federal Building press room (White was stationed in San Francisco); Feldman identified White's writing in this diary entry.[5]

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[5] Defendant notes that - the December 20, 1957, Christmas party is one to which presumably all federal law enforcement employees in San Francisco were invited, and thus the entry in George White's diary may indicate that he was referencing the gathering as little more than a social event. In fact, White's diary contains a similar entry on December 21, 1956; on that

Bender Dec. October 17, 2003, Exh. H, at 1; 2nd Feldman Dep., at 411. Feldman confirmed that White's illness would not have impeded his work; a planned LSD test would have taken place irrespective of whether or not White was sick and had to remain at home:

> Q. If George White was home with the flu, would you continue to carry out your operations in terms of the job, as you knew it?
> A. Of course. I was only an agent. I wasn't the boss.
> Q. But you had certain assignments, and you would carry them out?
> A. Absolutely.

Id. at 413. For his part, Ritchie avers that he attended that Christmas party, which took place in the San Francisco Post Office Building where he worked. Ritchie Dec. ¶4. Feldman indicated that the "Post Office Building" in which Ritchie worked and the "Federal Building" described in White's diary were one and the same. 2nd Feldman Dep., at 408-411. Both sides also agree generally that the CIA (and Ira Feldman in particular) was engaged in drugging unwitting victims with LSD in and around 1957. *See generally* 2nd Feldman Dep.

In addition, plaintiff points to the very fact of his behavior as evidence that he was under the influence of LSD. The parties' agreement that Ritchie experienced a psychotic episode is

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date, it reads "Christmas party press room." 2nd Feldman Dep., at 408.

tantamount to agreement that his actions on the night. of December 20, 1957, were completely out of character. Plaintiff alleges that his expert's diagnosis that he must have ingested LSD, coupled with Ira Feldman's apparent admissions, paint a compelling picture and constitute the necessary level of proof for a summary judgment motion on this issue. Plaintiff supplements this argument with the testimony of Dan Casey, a San Francisco-based federal narcotics agent who knew Ritchie and found his actions on the night of December 20, 1957, completely out of character. *See* Casey Dep., at 7-10. Since these medical diagnoses are relevant to the separate causal issue of Ritchie's attempt to isolate the particular catalyst for his psychotic episode, they are discussed at greater length below. The court addresses the dueling opinions of plaintiff and defendant's experts at length in Section III., infra, and discusses the importance of these diagnoses' to plaintiffs claim of having been drugged by the CIA at the December 20th Christmas party below in Section II. C.

B. Defendant's Principal Proffered Facts

The evidence that defendant offers in contradiction of Ritchie's claim centers around the first deposition of Ira Feldman, taken on July 30, 2002. In the course of that deposition, Feldman repeatedly stated that he had never heard of plaintiff, would not recognize him if shown a photo of him, and had not administered LSD to him. *See* 1st Feldman Dep., at 245-46 ("Q: Now, did you

remember a Deputy U.S. Marshal by the name of Wayne Ritchie? A: Never, never, never. I never--if he walked in here now, I wouldn't know him."). Feldman testified further that he did not even attend the Christmas party in the Post Office Building on December 20, 1957, at which plaintiff alleges he was dosed with LSD. *Id.* at 168-69 ("Q: Did you ever attend a holiday party over at the Post Office building? A: No, I didn't."). Placing the final categorical stamp on his denials of involvement in the substance of plaintiffs allegations, Feldman states that he never even entered the press room of the Post Office Building where plaintiff claims he was drugged. *Id.*at 237 ("Q: And what usually occurred in the press room? Was that for press conferences? A: I don't know. I was never there. I never was there. Q: You were never in that room? A: Never in that room.").

Defendant also points to an exchange that occurred towards the beginning of Feldman's second deposition in which Feldman again denies any knowledge of or involvement with the alleged doping of plaintiff with LSD. The exchange between plaintiff's counsel and Feldman is somewhat meandering, and each individual question and answer could appear ambiguous if not read in context, and so the conversation is reproduced at length below:

> Q: And could you give us, to the best of your recollection, some examples of the things that you now recall that happened to people ... by giving LSD?

A: People would become very hallucinogenic. They would see things that they shouldn't see. They had trouble walking. They had trouble eating. A lot of people threw up, and a lot of people passed out.
Q: No. But I'm talking about your experience when you said "it made people act like jackasses."
A: Yes. When they fell down, when they spit all over themselves, yes, they are jackasses. Normal people don't act that way.
Q: If somebody acted like a jackass; would that be erratic behavior?
A: It depends on what Webster says. I don't know what it is.
Q: And how about if somebody went out and held up a bar? This would be erratic behavior, wouldn't it?
A: No. That would just be a drunken bum.
Q: Or would it be a jackass?
A: No. It wouldn't be a jackass. He would be a U.S. Marshal that got drunk. and fell on his ass. That's what he would do.
Q: I see.
A: He doesn't come under this cover here.
Q: I see. You remember that situation?
A: No. *I don't remember that situation.* But this last two or three years it has all been your clients that got drunk. I don't remember the situation. *I wasn't even there, period. Nobody I knew was there.* He just got loaded and he fell on his ass and he pulled out a gun and he held up a bar. If you can beat that in court, be my guest.

> Q: And you know, as a fact, sir, from your position and expertise in administering LSD, that he did not have LSD?
> A: Do I know?
> Q: Yes.
> A: I don't know. I wasn't there. I didn't hear about it. I didn't see about it until it came out in the newspaper, God knows, how long afterwards. And not for 15, 20 years later I didn't know, no, didn't know a thing about it.

2nd Feldman Dep., at 352-355 (emphasis added). It was only later in Feldman's deposition that he appeared to admit having administered LSD to plaintiff, and it is the discrepancy between Feldman's remarks at various times that forms the crux of this question as placed before the court. See 2nd Feldman Dep., at 428- 435 (*supra* pp 5-6).

C. Evaluation of Competing Claims

The principal difficulty in evaluating plaintiff's motion for summary judgment on the issue of his LSD drugging here arises from the fact that the plaintiff and defendant rely most heavily upon the same witness. Ira Feldman, the admitted CIA operative and one-time MKULTRA participant, stands at the very center of this case, arid the question of which version of his story to believe forms the crux of this court's inquiry. On multiple separate occasions during his first and second depositions Feldman denied--under direct questioning--that he had participated in any

drugging of Ritchie, or indeed that he had ever before seen or interacted with Ritchie. However, during his first deposition Feldman denied ever administering drugs to unwitting suspects, a denial that Feldman himself and others have since convincingly refuted. *See, e.g.*, 1st Feldman Dep., at 36 ("Q. Mr. Feldman, did you ever witness anybody slipping LSD to another person? A. Never did. Q. Did you ever slip LSD to another person? A. Never did. Never did."); id. at 245 ("Q. Did you ever slip LSD into anybody's drinks? A. Never did."); 2nd Feldman Dep., at 432 ("Q. So that every time that you gave somebody LSD, Sidney Gottlieb was along? A. No, he wasn't along. But he most likely knew these people."). Like the thirteenth chime of a broken clock, the demonstrably incorrect statements in Feldman's first deposition cast doubt upon all those that preceded them.

However, Feldman's denials at the beginning of his second deposition are no more equivocal. At the beginning of Feldman's second deposition, plaintiffs counsel showed Feldman a transcript of an interview that Feldman had given in which he admitted to having administered LSD to numerous non-consenting individuals. *See* 2nd Feldman Dep., at 345-46. Confronted with this evidence, Feldman lacked a compelling reason to continue to lie about his involvement with MKULTRA and could hardly perpetuate his denials with any semblance of credibility. It thus remains significant that, at least at first, he continued to resolutely deny ever having drugged Wayne Ritchie.

By comparison, the statements that appear to implicate Feldman in Ritchie's alleged drugging do so only obliquely: Feldman compares Ritchie's psychotic episode to the actions of an LSD victim without stating positively and explicitly that he knew Ritchie to have consumed LSD. *See* 2nd Feldman Dep., at 428-429 ("You just back away and let them worry like this nitwit, Ritchie.... Let them have a full head, like what happened, like what happened with this nut when he got out and got drunk."); *id.* at 435 (identifying Ritchie as an LSD victim by saying "[t]he bird, like this guy, who saw snakes coming out, he deserved to suffer [from having had LSD administered]. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone."). From the first moment of his deposition Feldman undoubtedly knew that Wayne Ritchie was alleging that he had been drugged with LSD; Feldman might easily have assumed that Ritchie's drugging was a foregone conclusion, and that the only remaining question concerned whether Feldman had participated in that drugging himself. In fact, Feldman's first putative self-implication came directly after plaintiffs counsel had referenced a San Francisco Chronicle article entitled "Good Guy Fails as Bad Guy" written in 1957 about Ritchie's attempted armed robbery. *See* 2nd Feldman Dep., at 427-28. The nature of Feldman's subsequent remarks--whether the reference to Ritchie's robbery triggered an unconscious admission or merely induced Feldman to offer a needless and unfortunate comparison) remains shrouded in uncertainty. .Nevertheless, it is

inescapable that other explanations beyond Feldman's guilt exist to explain his remarks.

It is also noteworthy that on no occasion did plaintiffs counsel follow Feldman's allusions to Ritchie with more direct questioning designed to pin down precisely what Feldman intended to be saying.[6] The absence of such questioning certainly

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[6] Plaintiff protests that the obdurate behavior of defendant's counsel is to blame for his inability to ask such a follow-up question, and indeed the record of Feldman's deposition appears to support this contention. The most notable interruption came as Feldman appeared to be implicating himself in Ritchie's drugging for the third time:

A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone. And then he waits—

MS. KENNEY [defendant's counsel]: Mr. Feldman-MR. BENDER [plaintiffs counsel]: He is answering the question. I object to your doing that at a critical time like this. You have some nerve to interrupt that witness now. That's horrible.

MS. KENNEY: He appears to be spacing out.

MR. BENDER: He is not spacing out. You may be spacing out because of the testimony he is giving.

MS. KENNEY: The video will show it.

MR. BENDER: It sure will.

MS. KENNEY: Go ahead.

MR. BENDER: Will you pick up where he left off? Will you read it to him?

MS. KENNEY: We have been sitting here since—

MR. BENDER: We are in the middle of an answer

MS. KENNEY: We have been sitting here since 1 o'clock this afternoon. At a convenient time we will take a break.

MR. BENDER: We had a break.

MS. KENNEY: You tell me when it is convenient. But sometime between now and 4:00.

does not eviscerate the potential veracity of plaintiff's asseverations regarding Feldman's admissions, but nonetheless it leaves this court in the position of essentially inferring facts from sideways comments, rather than explicit testimony. Plaintiff thus can hardly be surprised when this court finds it difficult to grant summary judgment on such grounds.[7]

MR. BENDER: Who do you think you are, to interrupt this witness like that at a critical time? You know what you are doing.
MS. KENNEY: Excuse me. I don't agree with you that it is at a critical time.
MR. BENDER: You know. That is why you did it.
MS. KENNEY: I don't agree with you.
MR. BENDER: Of course you don't.
MS. KENNEY: Do you want the reporter to read it back?
MR. BENDER: Please give him his answer as he is giving it.
(Record read).
Q. Do you want to continue?
A. No. That's it. That's all I remember.
Q. Can you give us some instances, when you were working with White, about who should be drugged?
A. No. I couldn't give you any instances at all.
MR. BENDER: Okay. Let's take a break.
2nd Feldman Dep., at 435-38. Plaintiff is correct that defense counsel interfered improperly with his attorney's deposition of Ira Feldman, and that these interruptions may well have denied plaintiff the opportunity to solicit further valuable testimony. Nevertheless, plaintiffs counsel never pressed this issue by asking Feldman again if he had drugged Wayne Ritchie and then pointing to his earlier testimony were he to again deny the charge.

[7] Feldman's potentially contradictory replies add to this summary judgment motion an issue of credibility. Feldman's

Plaintiff also urges this court to consider his aberrant behavior on the night of December 20, 1957--and his expert's diagnosis attributing this behavior to ingestion of LSD---when deciding his motion for summary judgment on the issue of whether the CIA did, in fact, drug him. Meanwhile, defendant's cross-motion for summary judgment raises the separate issue of whether plaintiff can prove causation, viz., that his robbery attempt was caused by LSD and not alcohol or some other catalyst. The question of causation, and the differing assessments offered by plaintiff and defendant's experts, are thus discussed in detail in the sections that follow, and the court will not recapitulate ("pre-capitulate") them here. For present purposes, it suffices only to state that these diagnoses are themselves sufficiently divided (and divided in a manner that this court cannot resolve in the context

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more explicit denials of having drugged Ritchie cannot help but cast doubt upon his subsequent references to involvement in those same alleged acts. At the same time, this court allowed plaintiff to take Feldman's deposition twice precisely because new information had come to light that might allow the plaintiff to elicit more useful--or even more truthful-information from Feldman. The circumstances present a conundrum for any fact-finder tasked with determining which of Feldman's several conflicting recitations of history to believe. Fortunately, this task does not permissibly fall to the court at this stage. This court may not make credibility determinations in the context of a motion for summary judgment. *Anderson, 477 U.S. at 249.*

of cross motions for summary judgment) that they add little to the analysis at this stage.

In addition, plaintiff's expert reached his conclusion attributing plaintiffs robbery attempt to the ingestion of LSD in large degree because of the separate accusations (and supporting evidence) that plaintiff had been unwittingly administered that drug. Absent such allegations and background, and faced with merely a cold medical record, it seems unlikely that plaintiffs expert would have independently fixed upon LSD as the precise cause of plaintiff's actions, eliminating from consideration all other potential psychological factors. [8] Thus, it is largely circular for plaintiff to attempt to buttress his allegation of CIA drugging with an expert assessment that itself draws heavily upon that same allegation; plaintiffs expert's various reports heavily reference Ritchie's allegations from this action. *See*, e.g., Ketchum Reply to Abraham Rep., at 12 ("Turning to Mr. Ritchie's belief that he was drugged with LSD by the CIA, this is not an idle fantasy or a delusion lacking real-world foundation....").

Unsurprisingly, plaintiff and defendant paint substantially different pictures of the events of December 20, 1957, pictures that incorporate both direct testimony and the opinions of experts writing forty-five years after the fact. In light of these

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[8] Indeed, as described further below, plaintiffs expert opines that Wayne Ritchie was under the influence of a "pharmacological agent," not that he was specifically administered LSD.

divergent perspectives, the opinions offered by each party's experts do not shed substantially new light on--nor force a substantial re-evaluation of--the factual questions that existed in the first place. By consequence, the testimony of Ira Feldman remains the singularly salient source of evidence on this issue.

Whatever else they may indicate, Feldman's disparate assertions certainly do not constitute such an overwhelming body of evidence that no reasonable juror could find other than that Ritchie was an unwitting victim of CIA Subproject 42. The lack of a direct, positive statement by Ira Feldman that he did, in fact, participate in (or at least knew of) Ritchie's drugging is most significant here. Without a clear, categorical admission of involvement by Ira Feldman it is simply impossible for this court to conclude that no reasonable juror could find against plaintiff; under such circumstances, and in the absence of such evidence, summary judgment for plaintiff is improper. *Anderson*, 477 U.S. at 248. At the same time, however, Feldman's sideways assertions do raise at least a triable issue of fact on this question-faced with Feldman's contradictions and the possibility that he may have truthfully, though unwittingly, inculpated himself, a reasonable jury would be capable of finding for plaintiff. Motions for summary judgment on fact issues such as these do not ask the court for its best judgment on the veracity of a claim; the court's only role is to eliminate issues of fact upon which there can be no reasonable disagreement. Despite the vagaries of Feldman's

responses--and his repeated unequivocal denials of involvement--this is an issue about which reasonable jurors might well disagree. The court hereby denies both plaintiffs and defendant's motions for partial summary judgment on the issue of whether "Wayne Ritchie was an unwitting victim of CIA Subproject 42."

III. LSD Causation

Defendant has moved for summary judgment on the issue of whether plaintiff has adduced sufficient evidence to present a triable issue of fact regarding the question of whether his behavior on the night of December 20, 1957, was in fact due to ingestion of LSD. Both sides agree that plaintiff suffered a brief psychotic episode that night that resulted in his attempted robbery of the Shady Grove Bar. See, e.g., Gottlieb Rep., at 17 ("Brief Psychotic Disorder on December 20 1957"); Ketchum Rep., at 10 ("It is certainly appropriate ... to regard Wayne's episode as a temporary psychotic disorder."). Defendant has introduced the declarations of two psychiatric experts, Dr. Kenneth I. Gottlieb, MD., and Dr. Henry D. Abraham, M.D., both of whom opine that plaintiffs' actions and symptoms were more likely caused by the alcohol he ingested than by any potential doping with LSD.[9]

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[9] Dr. Abraham conducted a psychiatric examination of plaintiff in March of 2003. Dr. Gottlieb never examined plaintiff personally; he relied solely upon the written record in this case and the videotape of Dr. Abraham's examination.

Plaintiff relies upon the declaration of Dr. James S. Ketchum, M.D., another psychiatric expert, who argues that Ritchie's psychotic episode was most likely caused by LSD, rather than alcohol, in part because Ketchum does not believe that Ritchie would have been substantially affected, either on a short- or long-term basis, by the alcohol that he did consume. This case is made particularly difficult by the more than forty years that elapsed between Ritchie's psychotic episode and the psychiatric examinations used here to provide proof of causation (or lack thereof). Nevertheless, the court can only proceed with the evidence before it and weigh if carefully considering the length of time that has passed.

A. Defendant's Principal Proffered Facts

Defendant's motion for summary judgment centers on the claim that Ritchie's behavior was caused by both his near-term and long-term drinking. Ritchie was, by all accounts, a regular and occasionally heavy drinker. See, e.g., Abraham Rep., at 7 ("The plaintiff admits a past history of the excessive consumption of alcohol."); *id.* at 8 ("The plaintiff qualifies on [the Michigan Alcohol Screening Test] scale as a problem drinker at least during the years 1949 through 1957."). Three separate times within the years preceding 1957, Ritchie had consumed as many as 15 to 25 drinks during one evening. Ketchum Reply to Abraham Rep., at 6. On Friday, December 20, 1957, Ritchie

consumed approximately eight bourbon and sodas, beginning around noon at the Christmas party in the Post Office' Building and ending that evening at approximately 9:00 pm with his attempted robbery. Ritchie Dec. ¶4-10; Abraham Rep., at 3. The majority of this drinking occurred between 2:00 and 3:15 pm, upon Ritchie's second visit to the allegedly fateful Christmas party, where he consumed three to four bourbons. Ritchie Dec. ¶6.

Dr. Gottlieb bases his conclusion that Ritchie could not have been drugged with LSD on two principal factors. First, he notes that Ritchie did not seem to display the indicia of one who had been administered such a hallucinogen. He did not hallucinate. Gottlieb Rep., at 3. He did not experience excess sweating, blurred vision, shaking, or loss of coordination, and there is no mention of Ritchie having dilated pupils; according to Dr. Gottlieb, all of these are regularly documented symptoms of LSD use. *Id.* In addition, Dr. Gottlieb notes that "the plaintiff does not describe psychiatric afflictions characteristic of the post-LSD period." *Id.* at 4. In sum, Dr. Gottlieb concludes, "the plaintiff describes virtually none of the classical mental or physical features of the acute drug state." *Id.*. at 13. Second, Dr. Gottlieb claims that an LSD victim would not normally be capable of formulating a plan to commit a robbery, including taking the necessary predicate steps as did Ritchie. Gottlieb writes that [t]he planning and execution of a robbery, even a failed one, requires far more executive mental function than LSD ordinarily permits *Id.* It is worth noting that Gottlieb does not claim to be offering a

medical opinion that Ritchie was not given any LSD on December 20th; he believes simply that Ritchie cannot have been under the influence of LSD when he attempted to commit armed robbery. *See* Gottlieb Dec., at 60 ("Q....Doctor, have you expressed an opinion to a reasonable degree of scientific certainty that Mr. Ritchie did not have any LSD on December 20, 1957? A. No."). Dr. Gottlieb also does not deny that LSD is a powerful narcotic, or that it may produce bizarre behavior in those who ingest it. *See id.* at 59 ("LSD can make people very, very crazy.")

Rather, according to Dr. Gottlieb, "the plaintiff's behavior is quite consistent with numerous studies' in the literature associating the use of alcohol with crime." *Id.*. at 14. Interestingly, Dr. Gottlieb does not claim that Ritchie was actually drunk in the classical sense of the word. Dr. Gottlieb stated during his deposition that Ritchie "wasn't behaving in a drunk manner at all." Gottlieb Dep., at 65-66. Instead, Gottlieb opines that

> the condition from which ... Mr. Ritchie suffered was a psychotic state induced by alcohol. In the old days it would be called alcoholic hallucinosis. It is not related to being intoxicated with alcohol. It is associated with chronic alcohol ingestion, but it is not connected with alcohol intoxication.

Gottlieb Dep., at 65. Dr. Gottlieb thus does not rely upon the number of drinks that Ritchie consumed on December 20, 1957, as the causal factor for his behavior, but instead attempts to link Ritchie's actions to his longstanding consumption of alcohol.

In much the same fashion, defendant's second expert, Dr. Abraham, opines that Wayne Ritchie

could not possibly have been under the influence of LSD at the time of his robbery because he did not display any of the typical physical indicia of an individual who has consumed that drug. Dr. Abraham conducted a psychiatric examination on March 31, 2003, at the United States Attorney's Office in San Francisco and formed his opinions based on his analysis of Ritchie in that forum. Abraham Rep., at 1. Abraham's conclusions are relatively straightforward:

> Physically there is no report of bodily changes characteristic of LSD. There was no mention of dilated pupils made by anyone at anytime, (including a physician treating him for a head injury later that night). The plaintiff described some palpitations; But there was no excess sweating noted, no blurring of vision, shaking, or a loss of coordination. As he shared with me, "I didn't spill any drink at all."
>
> ...
>
> In the ensuing years the plaintiff does not describe psychiatric afflictions characteristic of the post-LSD period. That is, he described no recurrent perceptual flashbacks suggesting hallucinogen persisting perception disorder, such as trailing imagery or protracted afterimagery commonly seen following the use of LSD"

Id. at 3-4. Instead, Dr. Abraham believes that plaintiff is suffering from delusions brought on through a combination of his drinking and various of his personality traits, including "a hypersensitivity or even an imagined sense of rejection." *Id.* at 14. Dr. Abraham adds that

> [t]hese traits are consistent with a mixed personality disorder, with features of the avoidant, paranoid, and obsessive types. More to the point, they are likely to have been predisposing factors that led to the brief psychotic reaction the plaintiff appears to have suffered on under the influence of a large amount of alcohol.

Id. at 15.

B. Plaintiffs Principal Proffered Facts

Plaintiff's expert, Dr. Ketchum, makes a number of points by way of response to defendant's experts' contentions. Ketchum performed a so-called "differential diagnosis" upon Ritchie in which he believes he successfully dis-aggregated the various potential causal factors behind Ritchie's December 20, 1957, psychotic episode. Dr. Ketchum concludes that only LSD--not the alcohol Ritchie consumed nor any underlying neurological disease--can explain the events of that evening: "the only plausible explanation for the mental and emotional changes accompanied by the bizarre behavior shown by Mr. Ritchie on the day of his arrest is the ingestion of a pharmacological agent." Ketchum Rep., at 8. Foremost within his argument is the claim that Ritchie could not have been seriously intoxicated by the time he attempted to commit the robbery around 9:00 pm. Since Ritchie had only eight drinks in a period of nine hours, Ketchum estimates that his blood alcohol content would have been

approximately 20 mg%, well below the legal limit [10] and far too low to "produce this entire scenario" of incapacitation and robbery. Ketchum Reply to Abraham Rep., at 3-6. Notes Ketchum, "[p]harmacological studies of healthy non-alcoholic volunteers have demonstrated that this amount of alcohol is almost completely metabolized within such a time period." Ketchum Rep., at 11-12.

Ketchum also rejects the theory that Ritchie suffered from the type of long-term alcohol-induced psychosis that Dr. Gottlieb credits with causing his psychotic incident. Ketchum believes that "[t]he effects of alcohol alone do not explain the perceptual distortions, paranoid delusions, depression, poor judgment and loss of reality testing, nor the attempted commission of an illogically conceived, and ineptly executed criminal act." Ketchum Rep., at 8. Explains Ketchum further, "[a]lcohol-induced psychosis ... is associated with a prolonged period of heavy drinking and generally persists for days or weeks if untreated." Ketchum Rep., at 11 (emphasis in original). Ritchie's case, argues Ketchum fulfills neither of these conditions. Argues Ketchum, "[t]here is nothing to suggest a significant alcohol problem in his pre-1957 history, nor any indication that any of his colleagues or supervisors considered him to be a problem drinker." Ketchum Reply to Gottlieb Rep., at 1-2.

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[10] Ketchum evidently provides this fact not because it carries any legal significance, but merely as a useful metric for describing in commonly understood terms Ritchie's level of intoxication.

Rather than attributing Ritchie's actions to alcohol, Ketchum argues that Ritchie's behavior is entirely consistent with what might be expected of someone who had been dosed with LSD, particularly given the variability in effects that different doses administered under different conditions can produce. Noting that "the dose of LSD is unknown in this case," Ketchum remarks that "[d]oses as small as 30-50mcg, which may produce no outward signs, can cause marked disturbances in thinking and emotion." Ketchum Reply to Abraham Rep., at 7. Dr. Ketchum also links Ritchie's ever increasing paranoia [11] on the night of December 20th to ingestion of LSD: "This type of expanding delusion is characteristic of LSD effects. Once a paranoid line of thought occurs under the influence of LSD, everything else seems to corroborate it." *Id.*

Ketchum also disputes defendant's contention that an individual under the influence of LSD would be incapable of formulating the type of plan--involving several coordinate steps--that Ritchie had concocted to rob the bar at which he was eventually arrested. *Id.* Ketchum notes that his experience with LSD patients and his perception of them does not comport with Dr. Abraham's impression that they would be unlikely to commit such a crime: "A 'tongue-tied, blessed out, passive state' is certainly

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[11] Ritchie claims that the driving motivation behind his commission of the robbery was his belief that "everyone was against" him, including his fellow officers, co-workers across the hall, and even people at the bars he visited. Ritchie Decl. ¶ 7-9. This paranoia only increased as the night progressed.

not typical of what I have observed in almost 100 volunteers, and dozens of. Haight-Ashbury patients in 1967-68, most of whom went through a range of emotions and frequently were paranoid at times." *Id.* Finally, Ketchum takes issue with the significance that Dr. Abraham attaches to Ritchie's supposed lack of flashbacks subsequent to his alleged experience with LSD, Dr. Ketchum argues first that Ritchie *"did* have flashbacks, in the sense that a vivid reliving of the criminal behavior would suddenly occur unexpectedly while in the grocery store, painting, etc." *Id.* at 13 (emphasis in original). More to the point, Ketchum would not consider it surprising even if Ritchie were not subject to flashbacks, since one study "has reported from a large meta-analysis that most of those who have taken LSD do not report significant flashbacks, and if they do they usually occur only for a few days or weeks." *Id.*

C. Evaluation of Competing Claims

Defendant urges this court to grant summary judgment on the issue of whether LSD caused Ritchie's psychotic episode, arguing that the testimony of plaintiff's expert, when compared with that of defendant's experts, does not create a substantial issue of material fact. Upon consideration of all available evidence, this 'question devolves into a form both familiar to--and intractable for--the courts: the cliched "battle of the experts." Adding to the traditional difficulties in analyzing expert testimony .that attend any case in which

experts play a significant role is the nature of the evidence presented here. Plaintiff and defendant's experts are examining Ritchie-more 'than 45 years after the events which gave rise to this action; and much of their reportage takes the form of psychiatric evaluation. By consequence, they are forced to rely in large part upon their experience in dealing with similar patients (some of whom may have ingested alcohol or LSD) in previous situations. *See, e.g.*, Abraham Rep., at 13-14 (noting that plaintiff's behavior on the night of December 20, 1957, "does not conform to the mental state of tongue-tied; blissed-out, passive LSD cases I have observed in the last thirty years"); Ketchum Reply to Abraham Rep., at 7 (referencing his work with 100 LSD-ingesting volunteers and patients in a San Francisco clinic over thirty years ago). Moreover, they must draw conclusions based upon analogies between plaintiff's statements and a very limited knowledge foundation: there is hardly a plentiful public record of medical studies of LSD's effect on humans and nothing approaching medical consensus on the relevant issues.

This confluence of medical difficulties has rendered the experts unable to engage one another at the type of logical level that might enable this court to resolve the relevant issues on summary judgment. The parties' experts seem to lack the type of common experiences that might place their diagnoses on congruent planes; rather, they appear largely to talk past one another. It is difficult to quarrel with an expert who states that in his "extensive experience," his patients have generally

behaved in a certain manner; an argument from general experience cannot be conclusively rebutted by more of the same.

Furthermore, plaintiff's expert's reasoning simply does not contain any prominent, dispositive logical gaps that defendant's experts can exploit. Dr. Ketchum has come to a well-reasoned, coherent conclusion--one that defendant's experts reasonably dispute, to be sure, but one that is not plainly incorrect or misinformed. It is not the role of this court upon a motion for summary judgment to pick between these competing experts; that task is left to the factfinder at trial. *Anderson*, 477 U.S. at 249. It remains only for this court to ascertain whether a reasonable jury could legitimately find for plaintiff on the issue of causation given the evidence presented, and on that account the court is satisfied that plaintiff's expert has made a sufficient showing to enable a reasonable jury to hold in its favor *Id.* at 248.

CONCLUSION

For the reasons stated above, the court DENIES plaintiff's motion in its entirety, and DENIES defendant's motion in its entirety.

IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1161171 (N.D.Cal.)

CAPTION
DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED NOV. 7, 2003

George White nor Ira Feldman attended the Christmas party. Feldman denies being there.[2]

* * *

I. **Testimony evidence**

In the sworn testimony of Ira Feldman in a declaration and two deposition sessions taken seven months apart, there are inconsistencies, some of which can be easily explained. It is true that during the second day of deposition, Feldman who at his first deposition denied knowing about LSD and denied giving it to anyone, changed his testimony and vaguely claimed he had been involved in giving LSD, but did not say when during his 8 or 9 years in the San Francisco office of the Federal Bureau of Narcotics from 1955 until sometime in 1963 that he did so. See generally 1st Feldman Depo and at 6 (1955); 2nd Feldman Depo and at 335 (1963 or 1964).

* * *

[2] Declaration of Ira C. Feldman ("Feldman Decl."), filed on March 2, 2002, ¶¶ 3-4; Deposition of Ira Feldman ("1st Feldman Depo"), taken July 30, 2002, at 168-169.

A. Declaration of Ira C. Feldman, filed on March 2, 2002.

Mr. Feldman has repeatedly testified that he does not remember plaintiff from when plaintiff was a Deputy United States Marshal and that he has no knowledge of anyone drugging plaintiff at a Christmas Party on December 20, 1957. Specifically, in a declaration, Mr. Feldman testified:

> Based on the Complaint that plaintiff Wayne A. Ritchie filed, I understand that plaintiff alleges that he attended a Christmas party in the United States Post Office Building at Seventh and Mission on December 20, 1957 and alleges that he believes some unidentified person may have drugged his food or drink.

Declaration of Ira C. Feldman ("Feldman Decl."), filed on March 2, 2002, ¶ 3. Mr. Feldman went on to testify:

> I do not recognize plaintiff's name. I do not recall knowing anyone by the name of Wayne A. Ritchie. Although the Courts, the Office of the United States Attorney and the United States Marshal were located at the United States Post Office Building at Seventh and Mission, I worked in a different building. I never attended any Christmas parties which were held in the United States Post Office Building. I have no knowledge about anyone

> allegedly being drugged at a Christmas party on December 20, 1957. I have no reason to believe that anyone associates with the Federal Bureau of Narcotics drugged anyone at a Christmas party anytime.

Feldman Decl., ¶ 4.

B. Deposition of Mr. Feldman, taken on July 30, 2002.

As documented below, during the first day of his deposition, Mr. Feldman testified that he did not know plaintiff and did not remember him from a photograph which counsel showed him. Mr. Feldman testified that he had never been in the Press Room at the Post Office where plaintiff claims the December 20, 1957 Christmas party took place; that he did not attend any Christmas parties; that he specifically did not attend the Christmas party on December 20, 1957 where Mr. Ritchie claims he was slipped LSD. Mr. Feldman, who is Jewish and did not drink, never attended Christmas parties. 1st Feldman Depo, at 284.

1. Mr. Feldman does not recall knowing plaintiff.

Specifically, Mr. Feldman testified that he did not know plaintiff:

Q [Mr. Bender]: Now, did you remember a Deputy U.S. Marshal by the name of Wayne Ritchie?

A [Mr. Feldman]: Never, never, never. I never – if he walked in here now, I wouldn't know him.

Deposition of Ira Feldman ("1st Feldman Depo"), taken on July 30, 2002, at 167. Mr. Feldman also did not recognize a photograph of Mr. Ritchie from the late 1950's:

Q [Mr. Bender]: This is a picture of Wayne Ritchie that appeared in PX 8.

A [Mr. Ritchie]: I have it here.

Q: Okay. Do u recognize him as a Deputy U.S. Marshal?

A: I don't recognize him. I don't ever remember seeing him, never.

Q: Do you ever remember saying hello to him?

A: No, I don't.

Q: Where you friendly with the deputies?

A: Some of them I was, yes. They were very nice fellows. They were always helpful. They brought the jury in. They watched our prisoners.

We had them to some of the parties at the apartment, when we had retirement parties. They were very nice people.

Q: Did you ever recall seeing Ritchie at one of your retirement parties?

A: Never. I don't remember him one second.

* * *

1st Feldman Depo at 245-246.

2. Mr. Feldman did not attend Christmas parties, Including the one on December 20, 1957.

In response to questions from counsel for plaintiff, Mr. Feldman, who is Jewish, testified that he did not attend Christmas parties:

Q [Mr. Bender]: Do you remember ever attending a Christmas party in December of 1955?

A [Mr. Feldman]: No. I didn't.

Q: Do you remember attending a Christmas party in December of 1956?

A: I didn't.

Q: Do you remember these parties?

A: I don't remember the parties. I happen to be Jewish. I didn't believe in Christmas. So I didn't go to their parties. Okay?

Q: Were you a religious man?

A: I was a religious man until I met people like you.

Q: And in 1956, as a matter of being with acquaintances over at the courthouse, the Post Office building, did you ever go to any social gathering over there?

A: No, I didn't.

Q: And how about in the year 1957, December of 1957?

A: What about it?

Q: Did you ever attend a holiday party over at the Post Office building?

A: No, I didn't.

Q: You never attended any holiday party any year?

A: I never attended any parties there for one reason. The judges all had their offices upstairs. They had their restaurant upstairs. Downstairs was the post office. And the next floor was all the U.S. Attorneys. So I never bothered to be there except for business.

1st Feldman Depo at 168-169.

7. Mr. Feldman did not remember reading a newspaper Article at the time about plaintiff and did not remember Discussing plaintiff's attempted robbery.

In response to questions by counsel for plaintiff, Mr. Feldman repeatedly testified that he did not discuss plaintiff's attempted robbery of a bar. Mr. Feldman initially testified:

Q. [Mr. Bender]: The article is dated Sunday, December 22, 1957, from the San Francisco Call Chronicle, and it is entitled "Good Guy Fails as Bad Guy." (Pause.)

My first question to you about that article is, did you ever see that article before?

A: Never.

Q: Do you recall any discussion in the office shortly after this article appeared or at any

time about a Deputy U.S. Marshal who had held up a bar?

A: Never.

Q: Do you recall whether George White ever mentioned it to you?

A: Never did.

Q: Do you recall whether at one of your round table discussions with other agents there was any talk about the Deputy U.S. Marshal who held up a bar?

A: Never was.

Q: Did anybody broach the subject about a former U.S. Marine, who was a one time Alcatraz guard, who attended a Christmas party in the Post Office building and then thereafter went out and held up a bar?

A: Never.

Q: When you went over to the Federal Courthouse and you saw other deputy U.S. Marshals, did they ever say anything to you about one of their co-deputies who held up a bar after attending the Christmas party?

A: No.

Q: Did they ever talk to you about one of their co-deputies holding up a bar?

A: No.

1st Feldman Depo at 232-233.

C. Second Deposition of Ira Feldman, taken February 7, 2003.

During the second day of the deposition of Mr. Feldman, plaintiff's counsel was examining Mr. Feldman about a statement made in an interview for Spin Magazine in 1994 in which Mr. Feldman was quoted as saying that he gave LSD and that some people acted "like jackasses." Feldman Depo at 345-46. The following interchange took place in whi9ch Mr. Feldman made it clear that he did not know plaintiff and had never heard of him until Mr. Feldman was contacted in connection with the current lawsuit. Nothing to which Mr. Feldman subsequently testified on the second day contradicts his denial of any knowledge about plaintiff:

Q [Mr. Bender]: .....But I'm talking about your experience when you said "it made people act like jackasses."

A [Mr. Feldman]: Yes. When they fell down, when they spit all over themselves, yes they are jackasses. Normal people don't act that way.

Q: Did you ever hear somebody refer to it as provoking erratic behavior?

A: No.

Q: If somebody acted like a jackass, would that be erratic behavior?

A: It depends on what Webster says. I don't know what it is.

Q: And how about if somebody went out and held up a bar? This would be erratic behavior, wouldn't it?

A: No. That would just be a drunken bum.

Q: Or it would be a jackass?

A: No. It wouldn't be a jackass. He would be a U.S. Marshal that got drunk and fell on his ass. That's what he would do.

Q: I see.

A: He doesn't come under this cover here.

Q: I see.

You remember that situation?

A: No. I don't remember that situation. But this last two or three years it has all been your clients that got drunk.

I don't remember the situation. I wasn't even there, period. Nobody I knew was there.

He just got loaded and he fell on his ass and he pulled out a gun and he held up a bar. If you can beat that in court, be my guest.

Q: And you know, as a fact, sir, from your position and expertise in administering LSD, that he did not have LSD?

A: Do I know?

Q: Yes.

A: I don't know. I wasn't there. I didn't hear about it. I didn't see about it until it came out in the newspaper, God knows, how long afterwards. And not for 15, 20 years later I didn't know, no, didn't know a thing about it.

Q: You said until it came out in a newspaper.

* * * *

Q: Now, I marked this as the last exhibit on your deposition, Plaintiff's Exhibit 8, and that's

the newspaper article you are referring to, isn't it (handing)?

A: That was one of them. There was another one in the San Jose newspapers. I didn't see anything until the last hearing we had, and you showed me this. I never saw the papers themselves. No, I never saw it. I didn't know anything about this guy until approximately a year or two ago, when I was served with a subpoena.

* * * *

Deposition of Ira Feldman, taken on February 7, 2003 ("2d Feldman Depo"), at 358-360.

* * * *

C. Conclusion

For the foregoing reasons, plaintiffs motion for summary judgment should be denied.

Respectfully submitted,

KEVIN V. RYAN
United States Attorney

By:_____
Patricia J. Kenney
Assistant United States Attorney

Dated: November 7, 2003

Of Counsel:

Kathleen A. McGinn, Esq.

Office of General Counsel
Litigation Division
Central Intelligence Agency

Bettie E. Golman, Esq.
Ellen Harrison, Esq.
Drug Enforcement Administration

CAPTION
AMENDED JOINT PRE-TRIAL STATEMENT

The parties submit the following amended joint pretrial statement, pursuant to this Court's order at the November 8, 2004 case management conference and Fed. R. Civ. Proc. 26(a)(3):

1. THE ACTION

A. Substance of the Action.

Plaintiff Wayne Ritchie filed this action under the Federal Tort Claims Act to recover for injuries allegedly sustained on December 20, 1957. Ritchie alleges that on that day, he was unwittingly administered lysergic acid diethylamide ("LSD") by a private individual or an agent of the United States government at the direction of agents of the Central Intelligence Agency ("CIA") and/or the Federal Bureau of Narcotics ("FBN"). Ritchie contends- that he was the victim of a CIA program known as "MKULTRA," which involved - - among other things -- the administration of LSD to unwitting people during the 1950's arid early 1960's. At the time, Ritchie was a deputy United States Marshal at the San Francisco federal courthouse in · the Post Office Building. Ritchie also sued two former federal employees, Ira Feldman arid Robert Lashbrook, in their individual capacities for' violations of his constitutional rights. The Court dismissed the constitutional claims in 2001 on statute of limitations grounds.

The complaint seeks damages under the FTCA for negligent supervision, invasion of privacy, and intentional infliction of emotional distress. The

following disputed issues remain to be decided at trial:

1. Whether Wayne Ritchie was an LSD victim of the CIA's or FBN's' drugging program:
2. Whether Ritchie's alleged drugging with LSD was the cause of his psychotic episode?
3. If the answer to the above questions is affirmative, what are the non-economic damages suffered by Ritchie?

The parties have stipulated that the amount of economic damages that Ritchie suffered for past and future loss of earnings and retirement is $1,276,959, if the Court finds liability at trial.

B. Relief Prayed.

In addition to the economic damages described above, Ritchie claims $10,723,041 in non-economic damages.

II. FACTUAL BASIS FOR THE ACTION.

A. Undisputed Facts.

The parties submit the following facts that are not reasonably disputable, and stipulate that they maybe incorporated into the trial record without the necessity of supporting testimony or exhibits.

1. Plaintiff Wayne A. Ritchie was born on June 15, 1927. On December 20, 1957, plaintiff then 30 years old was a Deputy United States Marshal in the Northern .District of California, located in the federal courthouse in the Post Office Building in San Francisco.

2. On December 20, 1957, Ritchie lived at the Ellis Street apartment with Dorothy McGinn, his girlfriend and eventual wife. By that December 20, Ritchie and McGinn had known each other and lived

together for six months. McGinn was unemployed, and had recently moved to San Francisco from New York City.

3. December 20, 1957 was a Friday. Ritchie reported to work at the Marshal's Office on the second floor of the federal building at 8:30 in the morning, after stopping by Foster's coffee shop for a cup of coffee. Ritchie remembers Jim Eagan, a deputy U.S. Marshal in charge of the criminal department, being at work, along with Joe Maher, Bill Hannan, Charlie McCarthy, and Jim Comerford, who were deputy U.S. Marshals in the criminal department like Ritchie.

4. Sometime around noon on December 20, 1957, plaintiff Ritchie attended a Christmas party at the Press Room in the Pot Office Building for about a half hour, ate a sandwich, and drank a bourbon and soda, made with a shot of bourbon and ice cubes. Deposition of Plaintiff Wayne A. Ritchie, taken July 17-18, 2001, at 149,150-52-33. Plaintiff only drank bourbon and soda at the time. Id. at 149,150-52,33. Plaintiff returned to the Christmas party again later in the afternoon at about 2:00 p.m. for about an hour or possibly a little more, and had three or four more drinks. Id. at 244, 33, 102-03, 105,108.

5. At noon on December 20, 1957, Eagan allowed the other deputy U.S. Marshals in the criminal department to leave work early, so they could go Christmas shopping for their families. Ritchie stayed at work because he was the only deputy in his office, without a local family. Egan told Ritchie at noon that he could go to the federal building Christmas party to get some lunch.

6. The Christmas party, which was thrown by some attorneys who practiced in the federal courts, was in the press room on the third floor of the federal building. When Ritchie arrived at the party at noon, there were very few people there: just a few newspaper reporters and one or two court personnel.

7. Ritchie remembers one of the press rooms containing one long table with food for sandwiches and snacks like potato chips. In an adjacent room, there was a long table that was a self-service bar containing hard liquors, wines, mixers, and ice;

8. Ritchie returned to his office at 12:30, and worked until about 2:00 p.m. At 2:00 p.m., Jim Eagan returned to the office from a lunch engagement and told Ritchie he could go back to the Christmas party and have a few drinks if he wanted to. Ritchie returned to the party, and stayed for about an hour. He did not eat, but he drank three or four bourbon and sodas.

9. During both trips to the Christmas party, Ritchie does not recall seeing George White, Ira Feldman, Jim Eagan, or anyone else from the Federal Bureau of Narcotics or the Marshal's Service. There were 30 to 50 people at the Christmas party.

10. Ritchie left the Christmas party at about 3:00 p.m. and -returned to his office. Ritchie stayed at the office, alone, until 4:30 p.m., when he locked up the office and left.

11. Ritchie walked home from work. McGinn was at the apartment when Ritchie arrived, and she made negative comparisons between San Francisco and New York.

12. Ritchie knew McGinn had an ex-boyfriend in New York.

13. Ritchie left 'his apartment- - alone - -' five minutes after arriving there, and walked to the Vagabond Bar, where he had two bourbon and sodas. Ritchie stayed at the Vagabond Bar for 20 to 35 minutes, then walked towards the courthouse, stopping at three more bars along the way.

14. While visiting the bars on December 20, 1957, Ritchie had decided that he would retrieve his weapons from his locker at work, holdup a bar, and use the money to buy McGinn an airline ticket back to New York City. Ritchie did not have enough money in his checking account to buy McGinn a ticket. Ritchie also thought that robbing the bar would be an act of self-destruction.

15. Ritchie retrieved both of his service revolvers from his locker at work, and took them to his car, which was parked at the courthouse. He drove directly to the Fillmore District looking to rob a bar without coming into contact with any of his law enforcement friends.

16. Ritchie parked his car in the Fillmore District, and walked into the nearest bar. There were no customers in the bar, so Ritchie left. He heard some people talking and laughing in a bar down the street, so he walked there.

17. Ritchie walked into the Shady Grove Bar. He sat down and ordered a drink. When Ritchie finished his drink, he walked to a serving station at the end of the bar and showed the bartender his .38 caliber revolver. Ritchie asked for some money, and the bartender placed some bills on the counter.

Ritchie told the bartender to get some more money. At that point, a waitress asked Ritchie what he was doing, and when he turned around, someone knocked him unconscious. When Ritchie came to, the police had arrived and handcuffed him.

18. Plaintiff suffered a brief psychotic episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove bar.

19. While in jail, plaintiff resigned from his position as a Deputy United States Marshal. *Id.* at 353.

20. On February 19, 1958, plaintiff pled guilty to attempted robbery with a deadly weapon. *Id.* Exhibit I. On March 12, 1958, the state court suspended the sentence and imposed a $500,000 fine and placed plaintiff on probation for five years during which he was directed to "abstain totally from alcoholic beverage." *Id.*

21. Several subprojects funded under MKULTRA involved the administration of LSD to unwitting persons. These subprojects were established under the auspices of George H. White, a Federal Bureau of Narcotics official.

22. Subproject 42, which was established in February, 1955 when George White moved from New York City to San Francisco, involved the administration of drugs to unwitting people in the San Francisco area. George White supervised Ira Feldman in the San Francisco office of the Federal Bureau of Narcotics from 1955 to early 1963.

***

D. Disputed Fact Issues

1. Whether Wayne Ritchie was an LSD victim of the CIA's or FBN's drugging program?

2. Whether Ritchie's alleged drugging with LSD was the cause of his psychotic episode.

3. If the answer to the above questions is affirmative, what are the non-economic damages suffered by Ritchie.

***

F. Stipulations.

***

2. The parties stipulate that if the Court finds liability, then Ritchie's economic damages, past and future, total $1,276,959, as calculated by plaintiff's economist, Peter Formuzis.

1. PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO THE INHERENT POWER OF THE COURT

PLEASE TAKE NOTICE that on November 15, 2004 at 2:00 p.m., or as soon thereafter as he may be heard, plaintiff Wayne A. Ritchie will request the Court, Honorable Marilyn Hall Patel, in Courtroom 15 on the 18th Floor at 450 Golden Gate Avenue, San Francisco, California, pursuant to its inherent power to grant plaintiff's motion for sanctions against the defendant United States of America. The evidence in plaintiff's favor is clear and convincing:

(i) that defendant's attorneys practiced a deliberate "fraud on the court," has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice by threatening to interfere with the rightful decision of this case through (a) Feldman's perjury, (b) Feldman's lies suborned by defendant's attorneys, (c) submission of Feldman's false testimony knowing it was false in support of defendant's amended summary judgment motion, (d) intentional interference with, and obstruction of, Feldman's second deposition, . .. (f) intentional false representations to this Court, (g) preparation and submission to this. Court of Feldman's Declaration on March 2, 2002 that was deliberately designed to deceive this Court and (h) misconduct by defendant's attorneys that effectively subverted the federal

judicial system contrary to the duty of loyalty and honesty owed to this Court by defendant's attorneys;

(ii) that defendant's attorneys compounded the wrong done to plaintiff by willfully engaging in a scheme to deny plaintiffd ue process of law and deny him his day in court through the misconduct set forth under subparagraph (i) above which was planned and executed by lawyers from the United States Department of Justice (AUSA), the CIA and DEA which misconduct was deliberately, willfully, and intentionally flatly inconsistent with the requirements of a civilized judicial system that are firmly embedded in the law of our country. Therefore, we respectfully request this Court to exercise its discretion by striking defendant United States of America's answer and awarding plaintiff a partial final judgment on liability on the merits against the defendant and ordering a hearing on the damages issue. The Declaration of Sidney Bender, with Exhibits, is filed in support of this motion ("Bender Dec.").

CAPTION
REFILED DECLARATION OF SIDNEY BENDER IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS

I, SIDNEY BENDER, declare as follows:

1. I am a member of Leventritt Lewittes & Bender, attorneys for plaintiff, and appear in this action *Pro Hac Vice,* and am fully familiar with the factual and procedural history of this case. I submit this declaration in support of plaintiff's motion for sanctions pursuant to the inherent power of the court.

2. The following exhibits are attached:

Exhibit	Description
1.	Spin Magazine article
2.	Transcript of videotape of Feldman interview on Mind Control Murder (1999)
3.	Excerpts from Feldman's first deposition on July 30, 2002; Cover, 284-285,288,295-298
4.	Excerpts from Feldman's second deposition on February 7, 2003; cover, 346-347, 360-361, 367,428-435
5.	Excerpts from Feldman's second deposition on February 7, 2003; cover 471-472, 474,477-478
7.	San Jose Mercury News dated December 22, 1957
8.	Feldman's Declaration filed on March 2,

2002, executed on August 1, 2001

9. Transcript of Stratton 1994 videotape of some of Feldman's interview ("Acid Test")

10. Excerpts from Gittinger's first deposition on August 2, 2002; cover, 99-100, 107,109-110

11. Excerpts from John Mark's book *The CIA and Mind Control The Search For The Manchurian Candidate;* cover, 94-95, 98-99.

12. Excerpt from the Church Report; cover 391

I declare that, under penalty of perjury, the foregoing exhibits are true copies. Executed in New York, New York on this 13th day of October 2004.

s/_____
Sidney Bender

ALTERED STATES OF AMERICA

By Richard Stratton
Spin Magazine, March 1994

***

> "I was a very minor missionary, actually a heretic, but I toiled wholeheartedly in the vineyards because it was fun, fun, fun. Where else could a red-blooded American boy lie, kill, cheat, steal, rape, and pillage with the sanction and blessing of the All-Highest?"
> -George Hunter White

The meeting was set for noon at a suitably anonymous bastion of corporate America, a sprawling Marriott Hotel and convention center on Long Island. Driving out of the city, I was tense and paranoid.

***

Ira "Ike" Feldman is the only person still alive who worked directly under the legendary George Hunter White in MK-ULTRA.

***

I recognized Feldman immediately when he waddled into the lobby of the Marriott. I had heard he was short, five three, and I'd read how George White used to dress him in a pinstriped zoot suit, blue suede shoes, a Bursalino hat with a turned-up brim, and a phony diamond ring, then send him onto the streets of San Francisco to pose as an East Coast heroin dealer. Now in his '70's, Feldman still looks

and talks like Edward G. Robinson playing gangster Johnny Rocco in *Key Largo.*

***

"What's this about?" Feldman demanded. "Who the fuck are you?"

I explained I was a writer researching George White. White, a world-class drinker known to polish off a bottle of gin at a sitting and get up and walk away, died of liverdisease in 1975, two years before MK-ULTRA was first made public.

"Why do you want to write about White? I suppose it's this LSD shit."

No, I said, not just the LSD, George White deserved to have his story told.

"White was a son of a bitch." Feldman said. "But he was a great cop ..."

"The LSD," Feldman began, "that was just the tip of the iceberg.. Write this down. Espionage. Assassinations. Dirty tricks. Drug experiments. Sexual encounters and the study of prostitutes for clandestine use. That's what I was doing when I worked for George White and the CIA."

For my next Interview with Feldman, I rented a day room at the Marriott and brought along a tape recorder. Feldman totteredin, pulled a small footballshaped clear plastic ampule out of his pocket and pluncked it on the table. It was filled with pure Sandoz LSD..25. He also showed me a gun disguised as a fountain pen which could shoot a cartridge of nerve gas. "Some of the stuff George White and I tested," he explained.

Ike Feldman remembers that time well. A Brooklyn boy, he was drafted into the Army in 1941.

Army tests showed he had an unusual facility for language, so he was enrolled in a special school in Germany where he learned fluent Russian. By the end of the war, Feldman was a lieutenant colonel with a background in Military Intelligence. The Army sent him to another language school, this time in Monterey, California, where he added Mandarin Chinese to his repertoire.

While with Military Intelligence in Europe, Feldman first heard of George White. "White was with the OSS [Office of Strategic Services, forerunner of the CIA]. I heard stories about him. Donovan [William, "Wild Bill" Donovan, founder of the OSS] loved White...."

***

In the early '50's, after a stint in Korea working for the CIA under Army auspices, Feldman decided he'd had enough of military life. He settled in California.

***

"Before long, I got a call - this time from White," Feldman continued. "We understand you're back in the States," he says. "I want you to come in to the Bureau of Narcotics." This was '54 to '55, White was District Supervisor [of the Federal Bureau of Narcotics] in San Francisco. I went in. I go to room 144 of the Federal Building, and this is the first time I met George White. He was a big, powerful man with a completely bald head. Not tall, but big. Fat. He shaved his head and had the most beautiful blue eyes you've ever seen." "Ike," he says, "we want you as an agent. We know you've been a hell of an agent with Intelligence. The CIA knows it.

You speak all these languages. We want you to work as an under cover agent in San Francisco.."

What Feldman didn't know at the time was that George White was still working for the CIA. White's particular area of expertise was the testing of drugs on unwitting human guinea pigs. During the war, one of White's projects for the OSS was the quest for a "truth drug:' a serum that could be administered to prisoners of war or captured spies during interrogations. After trying and rejecting several substances the OSS scientists settled on a highly concentrated liquid extract of cannabis. indica, a particularly potent strain of marijuana. Never one to shrink from the call ofd uty, White first tried the drug on himself. He downed a full vial of the clear, viscous liquid and soon passed out without revealing any secrets.

Meanwhile, at the CIA's Technical Services Staff(TSS), the department specializing in unconventional weaponry such as poisons, biological warfare, psychoactive substances, .and mind control, Dr. Sidney Gottlieb was searching for a candidate to head MK-ULTRA. Gottlieb, a club-footed scientist who overcame a pronounced stutter in his rise to head the TSS, had discovered White's name while perusing old OSS files on the Truth Drug Experiments. White's credentials were impeccable: A former crime reporter on the West Coast before he joined the narcotics bureau, White had soon become one of the top international undercover agents under Harry Anslinger; the grandfather of America's war on drugs.

Moonlighting for the CIA, with funds he disbursed by Gottlieb, White rented two adjoining apartment safe houses at 81 Bedford Street in Greenwich Village. Using the alias Morgan Hall, he constructed an elaborate alter-"identity as a seaman and artist in the Jack London mode. By night, CIA spy Morgan Hall metamorphosed into a drug-eating denizen of the bohemian coffeehouse scene. With ahead full of acid and gin, White prowled downtown clubs and bars. He struck up conversations with strangers, then lured them back to the pad where he served drinks spiked with Sandoz's finest.

"Gloria gets the horrors ... Janet sky high," White dutifully recorded in his diary. In another entry, he proudly noted, "Lashbrook at 81 Bedford Street - Owen Winkle and the LSD surprise - can wash." In recognition of the often bizarre behavior brought on by the drug, White assigned LSD the codename "Stormy."

According to an agency memo, the CIA feared KGB agents might employ psychedelics "to produce anxiety or terror in medically unsophisticated subjects unable to distinguish drug-induced psychosis from actual insanity." In an effort to school "enlightened operatives" for that eventuality, Dulles and Gottlieb instructed high-ranking agency personnel, including Gottlieb's entire staff at TSS, to take LSD themselves and administer it to their collegues.

"There was an extensive amount 0 self-experimentation for the reason that we felt that a firsthand knowledge of the subjective effects of these drugs [was] important to those of us who were

involved in the program," Gottlieb explained at a Senate Subcommittee hearing years later.

***

But as covert LSD experiments proliferated, things down at CIA headquarters began to get out o hand. "LSD favors the prepared mind," wrote Dr. Oscar Janiger, a Los Angeles psychiatrist and early LSD devotee. Non-drug factors such as set and setting - a person's mental state going into the experience and the surroundings in which the drug is taken - can make all the difference in reactions to a dose of LSD.

Frank Olson was a civilian biochemist working for the Army Chemical Corps' Special Operations Divisions (SOD) at Fort Detrick in Frederick, Maryland....

***

Olson's specialty at Fort Detrick was delivering deadly diseases in sprays and aerosol emulsions.

Just before Thanksgiving in 1953, at a CIA retreat for a conference on biological warfare, Gottlieb slipped Olson a huge dose of LSD in an after-dinner liqueur. When Gottlieb revealed to the uproarious group that he'd laced the Cointreau, Olson suffered a psychotic snap. "You're all a bunch of thespians!" Olson shouted at his fellow acid trippers, then spent a long night wandering around babbling to himself.

Back at Fort Detrick, Olson lapsed in and out of depression, began to have grave misgivings about his work, and believed the agency was out to get

him. Ten days later, he crashed through the tenth-floor window of the Statler Hotel in New York and plummeted to his death on the sidewalk below.

***

"White had been testing the stuff in New York when that guy Olson went out the window and died," Feldman said. "I don't know if he jumped or he was pushed. They say he jumped..."

***

Unfazed by the suicide of their colleague, the CIA's acid enthusiasts were, in fact, more convinced of the value of their experiments. They would now focus on LSD as a potent new agent for offensive unconventional warfare. The drug-testing program resumed in the Bay Area under the cryptonyrn Operation Mid-night Climax. It was then that White hired Feldman.

Posing as Joe Capone, junk dealer and pimp, Feldman infiltrated the seamy North Beach criminal demimonde. "I always wanted top be a gangster," Feldman told me. "So I was good at it. Before long, I had half a dozen girls working for me. One day, White calls me into his office. 'Ike' he says, 'you've been doing one hell of a job as an undercover man. Now I'm gonna give you another assignment. We want you to test these mind-bending drugs.' I said, 'Why the hell do you want to test mind-bending drugs?' He said, 'Have you ever heard of *The Manchurian Candidate?* I know about *The Manchurian Candidate.* In fact, I read the book, 'Well,' White said, 'that's why we have to test these drugs, to find out if they can be used to brainwash people.' He says, 'If we can find out just how good

this stuff works, you'll be doing a great deal for your country.'"

These days, Feldman takes offense at how his work has been characterized by former cops who knew him. "'I was no pimp," Feldman insisted. Yet he freely admitted that his role in Midnight Climax was to supply whores. "these cunts all thought I was a racketeer," Feldman explained. He paid girls $50 to $100 a night to lure johns to a safe house apartment that White had set up on Telegraph Hill with funds provided by the CIA. Unsuspecting clients were served cocktails laced with powerful doses of LSD and other concoctions the CIA sent out to be tested.

"As George White once told me, 'Ike, your best information outside comes from the whores and the junkies. If you treat a whore nice, she'll treat you nice. If you treat a junkie nice, he'll treat you nice.' But sometimes, when people had information, there was only one way you could get it. If it was a girl, you put her tits in a drawer and slammed the drawer. If it was a guy, you took his cock and you hit it with a hammer. And they would talk to you. Now, with these drugs, you could get information without having to abuse people."

The "pad," as White called the CIA safe house, resembled a playboy's lair, circa 1955. . . .

***

White outfitted the place with elaborate bugging equipment, including four microphones disguised as electrical outlets that were connected to tape recorders hidden behind a false wall. While Feldman's hookers served mind-altering cocktails

and frolicked with the johns, White sat on a portable toilet behind the two-way mirror, sipping martinis, watching the experiments, and scribbling notes for his reports to the CIA.

***

"White always wanted to try everything himself," Feldman remembered. "Whatever drugs they sent out, it didn't matter, he wanted to see how they worked on him before he tried them on anyone else. He always said he never felt a goddamn thing. He thought it was all bullshit. . . ..

"This thing" - Feldman held up the fountain pen gas gun - "the boys in Washington sent if out and told us to test the gas. White says to me, 'C'mon, Ike. Let's go outside. I'll shoot you with it, then you shoot me." "Fuck that, " I said. "You ain't gonna shoot me with that crap." So we went outside and I shot George White with the gas. He coughed, his face turned red, his eyes started watering. He was choking. Turned out, that stuff was the prototype for Mace."

I asked Feldman if he'd ever met Sidney Gottlieb, the elusive scientist who was the brains behind MK-ULTRA. "Several times, Sidney Gottlieb came out," Feldman assured me. "I met Gottlieb at the pad, and at White's office. White used to send me to the airport to pick up Sidney and this other wacko, John Gittinger, the psychologist, Sidney was a nice guy. He was a fuckin' nut. They were all nuts. I says, "You're a good Jewish boy from Brooklyn, like me. What are you doing with these crazy cocksuckers? He had this black bag with him. He ways, "This is my bag of dirty tricks." He had all

kinds of crap in that bag. We took a drive over to Muir Woods out by Stinson Beach. Sidney says, "Stop the car." He pulls out a dart gun and shoots this big eucalyptus tree with a dart. Then he tells me, Come back in two days and check this tree." So we go back in two days, the tree was completely dead. Not a leaf on it. Now that was the forerunner of Agent Orange.

"I went back and I saw White, and he says to me, "What do you think of Sidney? 'I said, "I think he's a fuckin' nut." White says, "Well he may be a nut, but this is the program. This is what we do." White thought they were all assholes.He said, "These guys are running our Intelligence? but they sent George $2,000 a month for the pad, and as long as they paid the bills, we went along with the program." Gottlieb, who now lives in Virginia, refused to be interviewed for this article.

"Another time, I come back to the pad and the whole joint is littered with these pipe cleaners, " Feldman went on. Who's smokin' a pipe? Gittinger, one of those CIA nuts, was there with two of my girls. He had 'em explaining all these different sex acts, the different positions they know for humping. Now he has them making these little figurines out of the pipe cleansers-men and women screwing in all these different positions. He was taking pictures of the figurines and writing a history of each one. These pipe cleaner histories were sent back to Washington."

A stated goal of Project MK-ULTRA was to determine "if an individual can be trained to perform an act of attempted assassination involuntarily"

while under the influence of various mind-control techniques, and then have no memory of the event later. Feldman told me that in the early '60's, I after the MK-ULTRA program had been around for over a decade, he was summoned to George White's office. White and CIA director Allen Dulles were there.

"They wanted George to arrange to hit Fidel Castro," Feldman said. "They were gonna soak his cigars with LSD and drive him crazy. George called me in because I had this whore, on of my whores was this Cuban girl and we were gonna send her down to see Castro with a box of LSD-soaked cigars."

***

The public first learned on MK-ULTRA in 1977, with the disclosure of thousands of classified documents and CIA testimony before a Senate Subcommittee on Health and Scientific Research chaired by Senator Edward Kennedy. Ike Feldman was subpoenaed and appeared on a panel of witnesses, but the senators failed to ask him a single question. Sidney Gottlieb, complaining of a heart condition, testified at a special semi-public session. He delivered a prepared statement and admitted to having destroyed perhaps one set of files. Another set was turned over to Senate investigators. The full extent of the CIA'S activities under the rubric of MK-ULTRA may never be known.

George White retired from the Narcotics Bureau in 1965. The last ten years of his life, he lived in Stinson Beach, California, where, known as Colonel White, he went on the wagon for a few years and became chief of the volunteer fire department.

***

After White's death, his widow donated his papers, including diaries, to an electronic surveillance museum. As information on MK-ULTRA entered the public domain, people who had known White only in his official FBN capacity were stunned to learn of his undercover role as Morgan Hall.

Ike Feldman, kept alive by a pacemaker, lives with his wife in a quiet suburban Long Island community where he tends his garden and oversees a number of business interests. According to George Belk, a former head of the Drug Enforcement Agency in New York, Feldman quit the drug agency following a probe by the internal security division. "Feldman was the sort of guy who didn't have too many scruples" said Dan Casey, a retired FBN agent who worked with Feldman in San Francisco. "for him, the ends justified the means." A DEA flack confirmed Feldman "resigned under a cloud" at a time when a number of agents came under suspicion for a variety of offenses, none having to do with secret drug-testing programs.

***

'To make a long story short," he said using one of his favorite verbal segues, "I want the truth of this to be known so that people understand that what we did was good for the country."

***

IKE FELDMAN EXCERPTS FROM A&E's MIND CONTROL MURDER

At 1 minute, 17 seconds:
It didn't matter who they were, if they were American citizens or not. If they screwed up or they lied or they knew something they shouldn't, they were killed.

At 14 minutes, 46 seconds to 15 minutes, 16 seconds:
George White, as far as I was concerned, was a fine gentleman. He was a big fat, little man, about 250 lbs. He was mean and nasty, but he liked animals, he liked birds, he was good to people and I admired him a lot.

* * *

At 16 minutes, 14 seconds'to 16 minutes, 30 seconds:
The CIA was very interested in trying to find some kind of a mind bending material. . .that they could use for a truth serum which they thought was LSD.

At 18 minutes, 58 seconds to 19 minutes, 14 seconds:
We tested these drugs in bars, in restaurants, in so-called massage parlors, any place there was a *drink* and people were eating and drinking, that's where the stuff was tested.

At 36 minutes, 48 seconds to 36 minutes, 59 seconds:
As far as assassination was concerned, it was convenient and necessary if people knew too much or they were going to the wrong place to talk too much.

SAN JOSE MERCURY NEWS
SAN JOSE, CALIFORNIA SUNDAY MORNING,
DEC 22 1957

Officer
Held As
Robber

Suspect Beaten
In Holdup Try

SAN FRANCISCO - A deputy U.S. marshal Saturday faced a charge of armed robbery for trying to hold up a San Francisco tavern to get money for his girlfriend.

The suspect, Wayne A. Ritchie,

DEPUTY MARSHAL ARRESTED - Wayne A Ritchie, 30, a deputy U.S. marshal, sits in San Francisco City Jail Saturday, where he was booked on suspicion of robbery after he attempted holdup of a tavern.

CAPTION
DECLARATION OF IRA C. FELDMAN

I, Ira C. Feldman, declare as follows:

1. I am aware that plaintiff in this case originally named me as a defendant but that the action against me has been dismissed. My date of birth is December 10, 1918. A couple of years ago I had open heart surgery and, as a result, I find any travel extremely difficult.

2. From 1955 through 1968, I was a Special Agent for the Federal Bureau of Narcotics in San Francisco, California. Our office was located in the Federal Building which I believe was on Golden Gate Avenue. Several other agencies were also located in the Federal Building, including the Federal Bureau of Investigation.

3. Based on the Complaint that plaintiff Wayne A. Ritchie filed, I understand that plaintiff alleges that he attended a Christmas party in the United States Post Office Building at Seventh and Mission on December 20, 1957 and alleges that he believes some unidentified person may have drugged his food or drink.

4. I do not recognize plaintiff's name. I do not recall knowing anyone by the name of Wayne A. Ritchie. Although the Courts, the Office of the United States Attorney and the United States Marshal were located at the United States Post Office Building at Seventh and Mission, I worked in a different building. I never attended any Christmas parties which were held in the United States Post Office Building. I have no knowledge about anyone allegedly being drugged at a Christmas party on

December 20, 1957. I have no reason to believe that anyone associated with the Federal Bureau of Narcotics drugged anyone at a Christmas party anytime.

****

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of August, 2001, in Uniondale New York.

Dated: July 30, 2001

s/_____
Ira C. Feldman

IRA FELDMAN - ACID TEST

At 1 minute, 4 seconds:
I don't think it was a better enforcement and CIA agent in the world than George White. He was always drunk, but he always straightened himself up.

At 1 minute, 30 seconds:
We were very much interested in mind-altering drugs, dirty tricks, assassinations ...

At 2 minutes, 7 seconds:
When people had information there was only one way to get it, if it was a girl, you put her tits in the drawer and you closed the drawer, and if it was a guy you took his cock and you hit it with a hammer, then they would talk to ya.

At 2 minutes, 30 seconds:
I would go to various bars, various massage parlors, and these cunt all thought that I was a racketeer. I says, honey I want you to do a favor for me, and I says, I want you to pick up Joe Blow, take him to the apartment and give him a blow job. And while he's there I want you to ask him, heh, you how that airplane? How high did it fly?

At 3 minutes, 47 seconds:
I would give these drugs to certain people. Most of the times the LSD drug had a very, very bad effect. It would make people sick, it would make people believe that there were snakes coming through the

wall, it would make people believe that the ground was going to open up. It made people act like jackasses.

At 4 minutes, 41 seconds:
I must state that George White tried every one of these things that came from Washington. He didn't believe me telling him what happened to this girl or this guy, he wanted to try it himself.

CAPTION
VIDEOTAPED DEPOSITION OF JOHN W. GITTINGER TAKEN ON BEHALF OF THE PLAINTIFF ON AUGUST 2, 2002 IN NORMAN, OKLAHOMA **Page 99**

You observed David Rhodes actually putting LSD into an entertainer's drink in San Francisco; isn't that right?

A. I did not.

Q. You did not observe that?

A. I did not.

Q. And if he testified to that, would you say that he was creating a fiction, sir?

A. Yes, I certainly would.

Q. And is it your testimony, sir, that you never attended a club during the day with Mr. Rhodes at which he placed LSD into the entertainer's drink without her knowledge?

A. I did not.

Q. And if he testified, sir, that you were his superior and that you brought the LSD in a vial to him out in San Francisco, you would say he would be telling an untruth: is that it?

A. That is right.

Q. So it's a question of whether you're telling the truth or whether he's telling the truth?

A. I assume so, yes. .

Q. And he testified, just for - - that he - - when he was out there, he had - - he and Mr. Pasternak had called on this entertainer for at least eight days in which he socialized with her at the club that she was performing - -

xxx **Page 100**

Q. (By Mr. Bender) And he socialized with her for eight days before he actually slipped LSD into her drink Now, my question to you is, did he ever tell you that he intended to slip LSD into her drink?

A. I expect he did, yes.

Q. And when did he tell you that?

A. I think that probably was in the initial plan.

xxx **Page 107**

Q. Did anybody, under your direction, visit the club after the drug was administered to the entertainer?

xxx

THE WITNESS: There wasn't anybody there from the CIA except Rhodes and Pastemak.

Q. (By Mr. Bender) And Feldman from the Narcotics Bureau?

A. Yes. xxx

Q. (by Mr. Bender) . . .Did you subsequently have a meeting with Rhodes, Pastemak and Feldman at which the operation was discussed?

Not with Feldman - - Feldman.

xxx **Page 109**

Q. (By Mr. Bender) Who did Rhodes tell you about whether she was hospitalized or not?

A. I was told that the establishment called an ambulance and that she was taken by ambulance to Kaiser Memorial Hospital. And later on Ike Feldman checked up and found out that she was doing all right. And that's the last I knew of it.

xxx **Page 110**

Q. . . . Did Ike Feldman tell you that he checked up on her or did he tell David Rhodes?

A. As I remember, he did.
Q. He told you?
A. Yes.
Q. Did you learn subsequently that the entertainer's name was Ruth Kelly?
A. Yes.

McGraw-Hill Paperbacks

THE CIA AND MIND CONTROL THE SEARCH FOR THE MANCHURIAN CANDIDATE

"Explosive . . . A hell of a book"
- Studs Terkel

JOHN MARKS
Co-author of the CIA and the Cult of Intelligence

94

INTELLIGENCE OR "WITCHES POTIONS"

The San Francisco safehouse specialized in prostitutes. "But this was before The Hite Report and before any hooker had written a book," recalls a TSS man, "so first we had to go out and learn about their world. In the beginning, we didn't know what a john was or what a pimp did." Sid Gottlieb decided to send his top staff psychologist, John Gittinger, to San Francisco to probe the demimonde.

George White supplied the prostitutes for the study, although White, in turn, delegated much of the pimping function to one of his assistants, Ira "Ike" Feldman. A muscular but very short man, whom even the 5'7" White towered over, Feldman tried even harder than his boss to act tough. Dressed in suede shoes, a suit with flared trousers, a hat with a turned-up brim, and a huge zircon ring that was supposed to look like a diamond, Feldman first came to San Francisco on an undercover assignment posing as an East Coast mobster looking to make a

big heroin buy. Using a drug-addicted prostitute named Janet Jones, whose common-law husband states that Feldman paid her off with heroin, the undercover man lured a number of suspected drug dealers to the "pad" and helped White make arrests.

As the chief Federal narcotics agent in San Francisco, White was in a position to reward or punish a prostitute. He set up a system whereby he and Feldman provided Gittinger with all the hookers the psychologist wanted. White paid off the women with a fixed number of "chits." For each chit, White owed one favor. "So the next time the girl was arrested with a john," says an MKULTRA veteran, "she would give the cop George White's phone number. The police all knew What and cooperated with him without asking questions. They would release the girl if he said so. White would keep good records of how many chits each person had and how many she used. No money was exchanged, but five chits were worth $500 to $1,000." Prostitutes were not the only beneficiaries of White's largess. The narcotics agent worked out a similar system to forgive the transgressions of small time drug pushers when the MKULTRA men wanted to talk to them about "the rules of their game," according to the source.

TSS officials wanted to find out everything they could about how to apply sex to spying, and the prostitute project became a general learning and then training ground for CIA carnal operations. After all, states one TSS official, "We did quite a study of prostitutes and their behavior . . . At first nobody really knew how to use them. How do you

train them? How do you work them? How do you take a woman who is willing to use her body to get money out of a guy to get things which are much more important, like state secrets. I don't care how beautiful she is - educating the ordinary prostitute up to that level is not a simple task."

The TSS men continually tried to refine their knowledge. They realized that prostitutes often wheedled extra money out of a customer by suggesting some additional service as male orgasm neared. They wondered if this might not also be a good time to seek sensitive information. "But no," says the source, "we found the guy was focused solely on hormonal needs. He was not thinking of his career or anything else at that point." The TSS experts discovered that the postsexual, light-up-a cigarette period was much better suited to their ulterior motives.

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"If we were scared enough of a drug not to try it out on ourselves, we sent it to San Francisco," recalls a TSS source. According to a 1963 report by CIA Inspector General John Earman, "In a number of instances, however, the test subject has become ill for hours or days, including hospitalization in at least once case, and (White) could only follow up by guarded inquiry after the test subject's return to normal life. Possible sickness and attendant economic loss are inherent contingent effects of the testing."

The Inspector General noted that the whole program could be compromised if an outside doctor made a "correct diagnosis of an illness." Thus, the

MKULTRA tam not only made some people sick but had a vested interest in keeping doctors from finding out what was really wrong. If that bothered the Inspector General, he did not report his qualms, but he did say he feared "serious damage to the Agency" in the event of public exposure. The Inspector General was only somewhat reassured by the fact that George White "maintain[ed] close working relations with local police authorities which could be utilized to protect the activity in critical situations."

If TSS officials had been willing to stick with their original target group of marginal underworld types, they would have had little to fear from the police. After all, George White *was* the police. But increasingly they used the safehouse to test drugs, in the Inspector General's words, "on individuals of all social levels high and low, native American and foreign.." After all, they were looking for an operational payoff, and they knew people reacted differently to LSD according to everything from health and mood to personality structure. If TSS officials wanted to slip LSD to foreign leaders, as they contemplated doing to Fidel Castro, they would try to spring an unwitting dose on somebody as similar as possible. They used the safehouse for "dry runs" in the intermediate stage between the laboratory and actual operations.

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For these dress rehearsals, George White and his staff procurer, Ike Feldman enticed men to the apartment with prostitutes. An unsuspecting john would think he had bought a night of pleasure, go back to a strange apartment, and wind up zonked. A

CIA document that survived Sid Gottlieb's shredding recorded this process. Its author, Gottlieb himself, could not break a lifelong habit of using nondescriptive language. For the MKULTRA chief, the I whores were "certain individuals who covertly administer this material to other people in accordance with [White's] instructions." White normally paid the women $100 in Agency funds for their night's work, and Gottlieb's prose reached new bureaucratic heights as he explained why the prostitutes did not sign for the money: "Due to the highly unorthodox nature of these activities and the considerable risk incurred by these individuals, it is impossible to require that they provide a receipt for these payments or that they indicate the precise manner in which the funds were spent." The CIA'S auditors had to settle for canceled checks which White cashed himself and marked either "Stormy" or, just as appropriately, "Undercover Agent." The program was , also referred to as "Operation Midnight Climax."

TSS officials found the San Francisco safehouse so successfiil that they opened a branch office, also under George White's auspices, across the Golden Gate on the beach in Marin County. Unlike the downtown apartment, where an MKULTRA man says "you could bring people in for quickies after lunch," the suburban Marin County outlet proved useful for experiments that required relative isolation.

FOREIGN AND MILITARY INTELLIGENCE

FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES UNITED STATES SENATE TOGETHER WITH ADDITIONAL SUPPLEMENTAL AND SEPARATE VIEWS

April 26, 1976

LSD was one of the materials tested in the MKULTRA program. The final phase of LSD testing involved surreptitious administration to unwitting nonvolunteer subjects in normal life settings by undercover officers of the Bureau of Narcotics acting for the CIA.

The rationale for such testing was "that testing of materials under accepted scientific procedures fails to disclose the full pattern of reactions and attributions that may occur in operational situations."

According to the CIA, the advantage of the relationship with the Bureau was that

Test subjects could be sought and cultivated within the setting of narcotics control. Some subjects have been informers or members of suspect criminal elements from whom the Bureau of Narcotics] has obtained results of operational value through the tests. *On the other hand, the effectiveness of the substances on individuals at all social levels, high and low, native American and foreign, is of great significance and testing has been performed on a variety of individuals within these categories*
[Emphasis added.]

THE FOLLOWING PETITIONER'S EXHIBITS AND DEPOSITION EXCERPTS WERE INTRODUCED AT TRIAL AND SOME OTHERS HAVE BEEN REPRODUCED AS PART OF THE SUPPORT FOR PETITIONER'S MOTION FOR SANCTIONS, supra.

Sunday, December 22, 1957
San Francisco Chronicle

Good Guy Falls As Bad Guy

By Hale Champion

WAYNE RITCHIE
The slowest gun alive

You would have to call it an adult Western.

There were, after all, a two-gun U.S. marshal, a waitress lady fiend with a roving eye and a bunch of the boys whooping it up in the Shady Grove saloon.

It is the drama of a good guy who went bad because a dame done him wrong.

PLAINTIFF'S EXHIBIT 2

Wayne A. Ritchie, 30, of 710 Ellis Street, is a U.S. deputy marshal, an ex-Marine, a onetime Alcatraz guard, a wiry, balding fellow with a firm chin.

About five months ago, he got a final divorce from his wife and soon thereafter met a cocktail waitress who, if he had had his way, would be nameless.

She was, he reported yesterday morning, small, slender, brown-haired, green-eyed and 32. He loved her dearly and looked forward to formalizing their living arrangements in February.

But he was a little disturbed as he went about his work Friday - picking up and delivering assorted bad men, two bank robbers and a confidence man, to and from courts and jails.

She had been talking long distance to a man in New York City, the city from which she came to the West four months ago, and Ritchie was upset. A Federal Office Building Christmas party and four or five bourbons with soda helped, however, and went back to the apartment after work feeling pretty good.

She was waiting for him, calmly flipping the pancakes she knew he loved.

Between adroit flips, she told him.

"I'm going back to New York," she said (Flip.)

If I get the money in time, I'll take the plane Sunday." (Flip.)

"Are you going back to the other guy?" (Flip.)

"I'm just going back to New York." (Flip.)

Exit Deputy Marshal Ritchie.

From bar to bar he went, drowning his sorrows, caring not.

"Although he didn't remember the incident yesterday, he apparently met his green-eyed flame again about 8:30 p.m. in an O'Farrell street bar.

She (Dorothy McGuin, also of 710 Ellis Street and without employment, she told police) had another heated discussion with him, then took her turn in walking out.

As he sat there, he had an inspiration.

He'd show her what kind of man he was. He'd bandage his wounded ego. He'd get the money for her trip to New York - the kind of magnificent gesture that befitted a gentleman of the old Tenderloin West.

In short, he would stage a holdup.

He went back to the U.S. marshal's office and picked up two snub-nosed .38 special revolvers, tucking them into the top of his trousers, one on each hip. Then he began to cruise the city in his car.

The deputy marshal ended up at the Shady Grove Saloon, 1340 Steiner Street.

It was about 10 p.m. and Ritchie knew what had to be done.

He swaggered in and up to bartender Malvin Stone, 33, of 1810 Bush Street, then drew the gun on his right hip.

""This is a holdup." he said.

"Open up this register or I'll blow your brains out."

Stone did, coming up with 14 $1 bills.

Ritchie spotted another cash register at the other end of the bar.

"Go up there and get everything out of that and hand it . . . . . .

But the deputy's gun sagged, and Stone was on him in a trice.

The bartender knocked the gun to the floor and other patrons joined in the ensuing melee.

I When Patrolman Raymond Skow arrived, he found the battered marshal, lump on his head and blood on his shirt, lying on the men's room floor. A number of men were sitting on him.

Skow also found the second revolver tucked in his pants causing some after-thought panic among those who had been resting comfortably on the deputy for the last few minutes.

Ritchie was carrying his deputy marshal's credentials so police put in a call to the U.S. Marshal's office before locking him away, explaining that one of the marshal's men was on the wrong side of the law.

The response was laughter and the banging of a phone receiver on a hook.

So police booked their fellow law enforcement officer into the city prison on suspicion of armed robbery.

A professional bondsman posted $2,500 bail and Ritchie went home.

The deputy was contrite and puzzled yesterday morning.

"I just can't account for it. I wouldn't have believed it", he said.

SAN JOSE MERCURY NEWS Obituaries
THURSDAY MARCH 11, 1999
S. Gottlieb, directed mind-control tests

New York Times
WASHINGTON - Sidney Gottlieb, who presided over the CIA'S Cold War efforts to control the human mind and provided the agency poisons to kill Fidel Castro, died Sunday in Washington, Va.

He was 80, and had spent his later years caring for dying patients, trying to run a commune, folk-dancing, consciousness-raising and fighting lawsuits from survivors of his secret tests.

Friends and enemies alike say Mr. Gottlieb was a kind of genius, striving to explore the frontiers of the human mind for his country while searching for religious and spiritual meaning in his life. But he will always be remembered as the government chemist who dosed Americans with psychedelics in the name of national security, the man who brought LSD to the CIA.

In the 1950's and early '60's the agency gave mind altering drugs to hundreds of unsuspecting Americans in an effort to explore the possibilities of controlling human consciousness.

PLAINTIFF'S EXHIBIT 6

In all, the agency conducted 149 separate mind-control experiments, and as many as 25 involved unwitting subjects. First-hand testimony, fragmentary government documents and court records show that at least one participant died, others went mad and still others suffered psychological damage after participating in the project, known as MKULTRA. The experiments were useless. Mr. Gottlieb concluded in 1972, shortly before he retired.

The CIA awarded Mr. Gottlieb the Distinguished Intelligence Medal and deliberately destroyed most of the MKULTRA records in 1973.

Mr. Gottlieb was also involved in the CIA'S assassination plots. In the Eisenhower and Kennedy administrations, Mr. Gottlieb, always under orders from the director of central intelligence, developed a poisonous handkerchief to kill an Iraqi colonel, an array of toxic gifts to be delivered to Fidel Castro, and a poison dart to kill a leftist leader in the Congo. None of the plans succeeded.

After he left the CIA, Mr. Gottlieb and his wife went to India, where he ran a leper hospital for 18 months. A lifelong stutterer, he pursued a master's degree in speech therapy.

He is survived by his wife and four children. Penny Gottlieb Cheluk, Rachel Gottlieb Sarnoff, Peter Gottlieb and Steven Gottlieb. Cleaving to old habits of secrecy, his wife declined to disclose the cause of Mr. Gottlieb's death.

IRA FELDMAN - ACID TEST

At 1 minute, 4 seconds:
I don't think it was a better enforcement and CIA agent in the world than George White. He was always drunk, but he always straightened himself up.

At 1 minute. 30 seconds:
We were very much interested in mind-altering drugs, dirty tricks, assassinations...

At 2 minutes. 7 seconds:
When people had information there was only one way to get it, if it was a girl, you put her tits in the drawer and you closed the drawer, and if it was a guy you took his cock and you hit it with a hammer, then they would talk to ya.

At 2 minutes, 30 seconds:
I would go to various bars, various massage parlors, and these cunt all thought that I was a racketeer. I says, honey I want you to do a favor for me, and I says, I want you to pick up Joe Blow, take him to the apartment and give him a blow job. And while he's there I want you to ask him, heh, you know that airplane? How high did it fly?

At 3 minutes, 47 seconds:
I would give these drugs to certain people. Most of the times the LSD drug had a very, very bad effect. It would make people sick, it would make people believe that there were snakes coming through the

wall, it would make people believe that the ground was going to open up. It made people act like jackasses.

At 4 minutes. 41 seconds:
I must state that George White tried every one of these things that came from Washington. He didn't believe me telling him what happened to this girl or this guy, he wanted to try it himself.

PLAINTIFF'S EXHIBIT 22

3 February 1953

GOTTLIEB, Dr. Sidney: Conference With

2. Dr. Gottlieb explained the very advanced work that is being done with Lysergic Acid (LSD) by OTS and its support groups.

3. Dr. Gottlieb stated the results to date were very encouraging, so much so that they did not wish to call to attention any Agency interests concerning Lysergic Acid and, hence, plan to use this and hence; plan to use the nonsense name " " rather than make reference to LSD or Lysergic Acid. Dr. Gottlieb indicated that in many ways, LSD, because of the infinitely small amounts necessary to produce a narcotic effect, is regarded as a very interesting and potentially effective agent for our use if it could be properly developed. Dr. Gottlieb pointed out that, LSD is quite capable of producing very strong mental derangement when used in amounts so small as to be unseeable and incapable of being tasted or smelled.

PLAINTIFF'S EXH. 28

FOREIGN AND MILITARY
INTELLIGENCE

FINAL REPORT
OF THE
SELECT COMMITTEE
TO STUDY GOVERNMENTAL OPERATION
WITICI RESPECT TO
INTELLIGENCE ACTMTIES
UNITED STATES SENATE
TOGETHER WITH
ADDITIONAL SUPPLEMENTAL AND
SEPARATE VIEWS

April 26, 1976

PLAINTIFF'S EXHIBIT 4

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3. *The Surreptitious Administration of LSD to Unwitting Non-Volunteer Human Subjects by the CIA After the Death of Dr. Olson.*

The death of Dr. Olson could be viewed, as some argued at the time, as a tragic accident, one of the risks inherent in the testing of new substances. It might be argued that LSD was thought to be benign. After the death of Dr. Olson, the dangers of the surreptitious administration of LSD were clear, yet the CIA continued or initiated a project involving the surreptitious administration of LSD to non-volunteer human subjects. This program exposed numerous individuals in the United States to the risk of death or serious injury without their informed

consent, without medical supervision, and without necessary follow-up to determine, without medical supervision, and without necessary follow-up to determine any long-term effects.

xxx 403

From its beginning in the early 1950's until its termination in 1963, the program of surreptitious administration of LSD to unwitting non-volunteer human subjects demonstrates a failure of he CIA'S leadership to pay adequate attention to the rights of individuals and to provide effective guidance to CIA employees. Though it was known that the testing was dangerous, the lives of subjects were placed in jeopardy and their rights were ignored during the ten years of testing which followed Dr. Olson's death. Although it was clear that the laws of the United States were being violated, the testing continued. While the individuals involved in the Olson experiment were admonished by the Director, at the same time they were also told that they were not being reprimanded and that their "bad judgment" would not be made part of their personnel records. When the covert testing project was terminated in 1963, none of the individuals involved were subject to any disciplinary action.

MANY PAGES OF THE DEPOSITION OF IRA FELDMAN INTRODUCED AT TRIAL ARE NOT REPRODUCED HERE. THE KEY PAGES 347,428-438 ARE REPRODUCED HERE

IRA FELDMAN'S DEPOSITION ON FEBRUARY 7, 2003

347

Q. The language is very simple. You use simple language.

"I would give these drugs to certain people."

You are talking about yourself, right?

A. What do you want to know?

Q. You gave the drugs, LSD, to certain people, didn't you?

A. To certain people I did.

IRA FELDMAN'S DEPOSITION FEBRUARY 7, 2003

428

Q. Now, all these people that you personally drugged, you never did any follow-up on them, in the sense of telling them that you had drugged them, did you?

***

A. Not all the people that **I drugged**. I drugged guys involved in about ten, twelve, period. I didn't do any follow-up period, because it wasn't a very good thing to go and say "How do you feel today?". You don't give them a tip. You just back away and let them worry, like this nitwit, Ritchie.

Q. When you say "let them worry", you mean let them have a head full of LSD...

A. Let them have a full head [of LSD] like what happened, like what happened with this nut [Ritchie] when he got out and got drunk.

429

Q. And did you understand the extent of the suffering that these people, these ten or twelve people, that you had given LSD to - the extent of the suffering that they would encounter as a result of being administered the LSD by you?

A. I did not, because none of them were suffering.

***

430

Q. Well, if people saw snakes coming out of the wall, do you think they were suffering?

A. If people saw snakes coming out of the wall and that stopped another Pearl Harbor from getting Americans killed, it was worth it. They could suffer their brains out. That's the way I feel about it. If it was doing good with the country, the hell with the people with the snakes. I love this country, period. I got medals to prove it. I'm a good - citizen, and I piss on these guys that are suffering. They would suffer so much so we wouldn't have trouble like we have today. Now, what more do you want to know?

***

Q. (continuing) When- you gave them LSD, you decided that the person that you chose would suffer?

* * *

431

A. No. I didn't decide.

Q. Who decided it?

A. Nobody.

432

Q. Who decided to give that particular person that you gave LSD to LSD? That was you?

A. Sidney Gottlieb. He said, "Get that guy. Get this guy. Ray, get this guy."

I didn't pick out anybody. I don't know what the hell-he wanted these people for.

Q: So that every time that you gave somebody LSD, Sidney Gottlieb was along?

A. No, he wasn't' along. But he most likely knew these people. He said, "Hey, Joe, the guy in the bar, give him some LSD." And he didn't say "LSD." He said, "Give them a dose. Give them a belt. Give them something. And let George know what's happening. "George" was White. When it was done, and I got a report, I wrote it up and gave it to White, and I have no idea what White did with that report

433

Q. So each and every time that you gave somebody LSD you were following orders to give that particular person LSD?

A. Absolutely. I didn't pick out anybody. I didn't pick out a soul.

Q. So you just followed the order of either Gottlieb, Treichler or White?

A. Right.

Q. And that's what you did?

A. That's what I did.

Q. And whoever they chose, that's the person you gave it to?

A. That's the way it was done.

***

434

Q ...But that's all you did was follow orders, is that right?

A. No. I didn't follow orders all the time.

Q. Did you ever say "I'm not going to give LSD to .that person"?

A. I didn't say that I said "Not this guy, not her," period. I was very, very choosey' period.

Q. So you negotiated with --

A. I negotiated. I more or less moved the chips a little bit.

Q. And in talking to Gottlieb, "Not this person. How about this person"?

A. Possibly. Possibly. Possibly.

Q. And you negotiated with Ray Treichler: "Maybe not this person. Let's do it to this person"?

A. Possibly. Possibly.

Q. So you have a distinct recollection of doing that negotiation?

A. Oh, absolutely I have a recollection.

435

Q. And you negotiated with White and you said "Maybe not this guy. Let's do it to this guy"?

A. Same thing, right. Absolutely.

Q. So you were in on the decision process.

A. Of course I was in on the decision process.

Q. So you were essentially deciding who was going to suffer and who was not going to suffer.

A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy [Ritchie], who saw snakes coming out, he deserved to suffer. He [Ritchie] had eight or ten drinks and then goes

out and gets a couple of guns and tries to hold up someone. And then he waits.

MS. KENNEY: Mr. Feldman

MR. BENDER: He is answering the question. I object to your doing that at a critical time like this. You have some nerve to interrupt that witness now. That's horrible.

436

MS. KENNEY: He appears to be spacing out.

MR. BENDER: He is not spacing out. You may be spacing out because of the testimony he is giving.

MS. KENNEY: The video will show.

MR. BENDER: It sure will.

MS. KENNEY: Go ahead.

MR. BENDER: Will you pick up where he left off? Will you read it to him?

MS. KENNEY: We have been sitting here since - -

MR. BENDER: We are in the middle of an answer.

MS. KENNEY: We have been sitting here since 1 o'clock this afternoon. At a convenient time we will take a break.

MR. BENDER: We had a break.

MS. KENNEY: You tell me when it is convenient. But sometime between now and 4:00.

437

MR. BENDER: Who do you think you are, to interrupt this witness like that at a critical time? You know what you are doing.

MS. KENNEY: Excuse me. I don't agree with you that it is at a critical time.

MR. BENDER: You know. That is why you did it.

MS. KENNEY: I don't agree with you.

MR. BENDER: Of course you don't.

MS. KENNEY: Do you want the reporter to read it back?
MR. BENDER: Please give him his answer as he is giving it.
(Record read)
BY MR. BENDER
Q. Do you want it to continue?
A. No. That's it. That's all I remember.
Q. Can you give us some instances when you were working with White, about who

438

should be drugged?
A. No. I couldn't give you any instances at all.
MR. BENDER: Okay. Let's take a break.

445

A. ...One woman I know ended up in the hospital. They become suicidal...

Feldman's Deposition – February 7, 2003

p. 363

Bender

Q. But I'm talking about what was discussed with Allen Dulles and Commissioner Anslinger, the head of the Bureau of Narcotics, came to see you and George White.

***

Q. (continuing) Was it in the '50s?

A. Oh, it was in the '50s. I would say it was sometime around late '56 or early '57. I don't know when these people died, but that's about the time I can remember.

Q. Can you tell me the subject matter of what was discussed at that meeting between the four of you?

A. I don't remember who started it, but somebody said Castro was a pain in our so and so, we got to get rid of him. And the only one says he wants to get rid of him, to kill him, says "We are going to kill him this, this and this."

***

Q. And you mentioned just before that LSD was given to him.

A. I said it?

Q. Yes.

A. Maybe I didn't give it to him. Maybe Sidney Gottlieb did. He went there.

p. 370

Q. ... Did you ever discuss with Gottlieb the reaction to LSD?

A. I may have discussed with Sidney or Gottlieb, as you say, reports that I gave to George White that Jo Blo did this or Mary Blo did that, that's all

p. 371

Q. John Gittinger.

A. ... As I said, maybe in a year he came out there eight, nine times, I don't remember.

FELDMAN'S DEPOSITION July 30, 2002

173

Q. And you got it from Dulles personally, right?
A. Personally. He came to San Francisco to see me and White, with Anslinger.

***

175

Q. Did Allen Dulles want to take care of Castro at the time? That was one of the reasons why he was seeing George White?
A. I don't know whether that time of not. They wanted to take care of Castro...
Q. Right. Now, how long did that meeting with Dulles last, to the best of your memory?
A. I would say two or three hours, in White's office.

He had a big office, like this. White was at the desk. Mr. Dulles was over here (indicating). Mr. Anslinger was here (indicating). I was here (indicating). And maybe one other agent.

176

White wanted, always wanted, something to protect himself. Another two agents was in there.

***

177

Q. Sir, in order for you to be sitting in with Allen Dulles, who was then the Director of the Central intelligence—isn't that correct?
A. That's correct.
Q. And Anslinger had what position?
A. He was the head of the Bureau of Narcotics.

Q. And White was a Federal narcotics agent in San Francisco?
A. Right.

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Q. And he was the divisional—how would you pronounce that? What would you say his title was?
A. He was the district supervisor of California, Arizona and Nevada.
Q. Right. And then you were there.
A. I was there.

***

Q. Right.
A. When you want something in this world, whether you are a big boy or a little boy, you come down, okay.

Mr. Dulles wanted something. Mr. Anslinger wanted something. White wanted something...

181

A. At that meeting- -I didn't know whether it was the meeting or at a further meeting- - they talked about assassinating Castro. Okay?

And why did they ask me? Because I happened to know a girl in Cuba whose brother was captured by Castro, and she had a hard-on for Castro.

So, in plain English, they figured, "We could get this girl to do something with her brother and perhaps kill Castro." Nothing about dipping kill Castro." Nothing about dipping cigars in or nothing, not at this time.

Feldman's Deposition on February 7, 2003 p. 374 Bender Q. Go ahead, state what you...understood "stormy" meant.

A. When I was originally introduced to the LSD, it came in a little glass vial with a black top and a piece of black thread on it. Sidney and White called it Stormy...

Deposition of David Rhodes of the CIA on July 23, 2002

p. 64

BY MR. BENDER:

Q. ... what did Ike Feldman do to assist you with respect to that particular club?

A. ... He was helping us to find appropriate clubs to meet people to invite to the party. Whether he specifically said go there or not I can't recall.

Q. Did he drive you around San Francisco at all?

A. Yes.

Q. He did. On more than one day?

A. As I recall, it was probably two days and pointed out here or there or something.

* * *

Q. Now, we now have six days when you had drinks with the entertainer.

p. 65

A. Uh-huh.

Q. Now, did there come a seventh day when you had a drink?

A. Yes.

Q. Was that the day that you administered LSD?

A. No.

Q. Again, that was Mr. Pasternak and yourself?

A. That's correct.

Q. So that's seven days now that you've had drinks with her. Now, was there an eighth day?

A. Yes.

Q. Was that the day that you administered --

A. No.

Q. Was not?

A. It was not.

Q. And --

A. None other times that we were.

* * *

p. 81

Q. Did you do any further unwitting drugging of persons after that?

A. No.

* * *

Q. When you testified before the Kennedy committee, did you tell them about that unwitting drugging of that entertainer?

A. No.

p. 82

Q. Why not?

A. There was no need to...

Q. You had met with the staff of the congressional committee before you testified; isn't that right?

A. That is correct. This was all done by phone.

p. 83

Q. Did you ever during those staff telephone conversations ever mention the fact that you had conducted an unwitting drugging in San Francisco of the entertainer?

A. No.

Q. But yet you told them about your trip to California with respect to the meeting of lesbians; isn't that correct?

A. That is correct.

Q. That was totally unrelated to any drugging event?

A. That is correct. That was primarily to got some more of Gittinger's Wechsler-Bellevues. He was collecting Wechsler-Bellevues and all sorts of --

Q. Had you met with counsel for the CIA prior to your telephone meeting with the staff of the --

A. No.

Q. Had you had any discussions with the CIA counsel?

p. 84

A. No.

Q. Did you decide on your own not to disclose the events of the unwitting drugging that you engaged in?

A. Yes.

Q. Was your decision not to reveal the circumstances of your unwitting drugging of the entertainer based on your view that you were bound by a secrecy agreement with the CIA?

A. I -- probably that went through my mind, yes, but I just made the decision to do it that way.

Q. Did you feel that you were misleading the committee by not disclosing your participation in the drugging of the entertainer?

A. Yes.

Q. You had taken an oath, did you not, when you went before the congressional committee to tell the truth?

p. 85

A. I did.

Q. Did you feel, sir, that you had violated that oath?

MS. KENNY: I'm going to object...

COMPLAINT
CAPTION

9. Sidney Gottlieb, Robert V. Lashbrook, George White and Ike Feldman were involved in the planning and/or execution of the CIA's MKULTRA program, which was implemented by its agents and agents of the Bureau of Narcotics to test hallucinogenic drugs on American citizens without their knowledge.

ROBERT S. MUELLER, III (CSBN 59775)
United States Attorney
JOCELYN BURTON (CSBN 135879)
Chief, Civil Division
PATRICIA J. KENNEY (CSBN 130238)
Assistant United States Attorney
ATTORNEYS FOR DEFENDANTS

CAPTION
DEFENDANTS' FIRST AMENDED ANSWER

9. Defendants admit that Messrs. Gottlieb, Lashbrook and White were involved in the planning and/or execution of the CIA's MKULTRA program, but deny the remaining allegations of paragraph nine.

CAPTION
Joint Case Management Statement Filed on May 9, 2001

Defendants' Position
After White died in the early 1970s, his papers were donated to the "Foothill Electronics Museum of the Perham Foundation" in Los Altos, California. CIA and DEA personnel who reviewed his papers in 1978-1979 concluded that a number of "unwitting subjects" they had identified "may have been administered LSD through the auspices of George White."

CAPTION
Plaintiff's Initial Disclosure dated May 9, 2001 Documents and Other Disclosure

8. An interview of defendant Ike Feldman as shown on the program Mind Control Murder- first aired on "Investigative Reports" by A&E on September 22, 1999, produced by principal Films of London, England.

CAPTION
Defendant's Initial Disclosure

I, Patricia J. Kenny, certify that to the best of my knowledge, information, and belief, based on an inquiry made by agency counsel, Kathleen A. McGinn, Esq., Central Intelligence Agency, and Ellen Harrison, Esq., Drug Enforcement Agency, United States Department of Justice, which was

reasonable under the circumstances, the attached initial disclosures, made in this action in accordance with Rule 26(a)(1), Federal Rules of Civil Procedure, are complete and correct as of the time it was made on May 7, 2001.

ROBERT S. MUELLER, III
United States Attorney

PATRICIA J. KENNEY
Assistant United States Attorney

Dates: May 7, 2001

Of Counsel:

Kathleen A. McGinn, Esq.
Attorney
Office of General Counsel
Central Intelligence Agency

Ellen Harrison, Esq.
Office of General Counsel
Drug Enforcement Agency
United States Department of Justice

[DEFENDANTS] DISCLOSURES PURSUANT TO RULE 26(a)

A. "[T]he name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information." Rule 26(a)(1)(A), Federal Rules of Civil Procedure.

Most of the potential witnesses who could have assisted in the defense of this case involving an alleged incident which is over 44 years old are unavailable or deceased:

Potential Witnesses with Discoverable Information If Alive Identified by the CIA:

George White (deceased)
Sidney Gottlieb (deceased)
Henry Bortner (deceased)
Willis A. Gibbons (status unknown)
Cornelius V.S. Roosevelt (deceased)
Robert Lashbrook
Frank Laubinger

Potential Witnesses with Discoverable Information If Alive Identified by the DEA:

George White (deceased)
Harry Anslinger (deceased)
Charles Siraqusa (deceased)
Sidney Gottlieb (deceased)
Ira Feldman

CAPTION
Defendants' Initial Disclosure dated May 7, 2001

d. Diary of former FBN Agent George H. White. Location: Foothill Electronics Museum of the Perham Foundation, Foothills Community College, Los Altos California.

CAPTION
Plaintiffs Third Supplemental Initial Disclosure Pursuant To Rule 26(a) and Civil L.R. 16-4 (d)

B. "[A] copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party and that the disclosing may use to support its claims or defenses, unless solely for impeachment." Rule 26(a)(1)(B), Federal Rules of Civil Procedure

19. Excerpts of George White's diaries for the dates during the years 1955 through 1958 as per Schedule A attached.

SCHEDULE A
GEORGE WHITE DIARIES PAGES BY DATE

1955	1956	1957	1958
3-30	2-3	1-10	1-22
3-31	2-7	1-11	3-15
4-3	2-8	1-26	4-22
4-5	4-7	1-27	4-23
4-17	5-1	6-10	4-24
5-20	5-24	6-15	5-6
6-10	5-25	6-16	6-21
7-7		6-17	7-30
7-8	6-14	7-7	10-26
7-9	6-19	7-8	11-6
7-20	6-22	8-9	11-12
7-22	6-23	9-10	11-13
7-26	7-27	9-23	
7-27	7-28	9-25	
7-31	7-29	9-26	
8-1	8-26	9-27	
8-3	8-28	9-28	
8-4	9-20	9-30	
8-6	9-21	10-3	
8-11	9-22	10-7	
9-16		10-16	
9-20		10-19	
9-21		10-23	
9-23		10-30	
10-4			
10-6			
11-19			
11-25			

1955	1956	1957	1958
12-6			
12-9			
12-12			
12-14			
12-16			

CAPTION
Declaration of Kathleen A. McGinn
Date June 3, 2002

I, Kathleen A. McGinn, do hereby declare and state as follows:

1. I am Associate General Counsel for the Central Intelligence Agency ("CIA" or "Agency"). I am one of the CIA attorneys responsible for this litigation.

2. Plaintiff's claims arise from an alleged incident which occurred on December 20, 1957, some 44 years ago. The purpose of this declaration is to identify individuals whose testimony would reasonably be expected to bear directly on plaintiff Ritchie's claims in this litigation and who also could have provided information which could lead to the discovery of other witnesses or evidence bearing on plaintiff's claims. Most of these individuals are dead.

* * *

3. During my 16 years with the CIA's Office of General Counsel, I have been directly involved in two other lawsuits that implicated the Agency's MKULTRA program. In the first litigation, *Orlikow v. United States*, Civil Action No. 80-3163 (D.D.C.), brought in 1980, nine Canadian plaintiffs challenged the Agency's partial funding of a psychiatric treatment program designed and implemented by Dr. Ewen Cameron, a renowned Canadian psychiatrist. That litigation was settled in 1988, shortly before trial. In the second litigation, *Kronisch v. United States*, et al., 83 Civ. 2458

(S.D.N.Y.), brought in 1983 as a *Bivens* and FTCA action...

* * *

During the course of these litigations, I became very familiar with the MKULTRA program through extensive review of documents and intensive interviews with Agency employees who have been involved in the MKULTRA program. Relying upon my knowledge of the MKULTRA program, I have compiled a list of individuals most likely to have information pertinent to the allegations in the complaint. I have attempted to locate these individuals as well as the individuals listed in plaintiff's Initial Disclosures, dated 8 May 2001. In the following paragraphs I will discuss each individual and his current status. For those individuals I have not been able to locate, I will outline what steps I have taken to find each person.

4. Dr. Sidney Gottlieb. Dr. Gottlieb was the Chief of the Chemical Branch within the CIA's Technical Staff ("TSS") from approximately 1952 until September 1957. Dr. Gottlieb's duties included the management of the MKULTRA program that commenced in April 1953. Dr. Gottlieb was one of the CIA personnel who over saw the MKULTRA subprojects that involved George White and possible unwitting drug testing at apartments in New York City and San Francisco. Dr. Gottlieb would have been able to testify about his personal knowledge of George White's activities and whether he or any other Agency employee requested that Mr. White conduct unwitting drug testing on any persons,

including plaintiff. Dr. Gottlieb died on March 7, 1999.

5. George White. George White was a Bureau of Narcotics official who was an MKULTRA subcontractor for the Agency from approximately 1953 until 1964. He was responsible for establishing a safehouse apartment in New York City and, in 1955, in San Francisco for the purposes of, inter alia, conducting unwitting drug tests on drug informants, prostitutes and others whom White met in connection with his work for the Bureau of Narcotics. Mr. White would have been able to testify about whether he gave LSD or any other drug to plaintiff on 20 December 1957 or whether he authorized any other person to do so. Mr. White died on 23 October 1975.

6. Henry W. Bortner. Mr. Bortner replaced Dr. Gottlieb as the Chief of the Chemical Branch within TSS in the summer of 1957 and assumed Dr. Gottlieb's duties, including the management of the MKULTRA program. Dr. Bortner was the Chief of the Chemical Branch in December 1957, when plaintiff alleges he was the victim of an unwitting LSD testing. Dr. Bortner would have been able to testify about his knowledge of George White's activities in San Francisco and whether Agency personnel requested that George White conduct any unwitting testing. According to the Social Security Death Index, Dr. Bortner died on 4 December 1970.

7. Willis A. Gibbons. Dr. Gibbons was the Chief of the Technical Services Staff and the Director of Research from October 1952 until April

1959. He was the supervisor for Dr. Gottlieb and Dr. Bortner and was responsible for approving the funding for the MKULTRA subprojects, including George White.

* * *

8. Phillip Goldman. "Phillip Goldman" is an alias for a TSS chemist who had some responsibilities for monitoring George White's MKULTRA subproject in San Francisco. Mr. Goldman cannot be identified by true name because his connection to the Agency remains classified.

* * *

9. Dr. James A. Hamilton. Dr. Hamilton, a graduate of Stanford Medical School, was a MKULTRA researcher who had contact with George White during White's time in San Francisco and may have provided medical advice to Mr. White pertaining to any unwitting drug testing that Mr. White conducted or considered.

* * *

10. Cornelius V.S. Roosevelt. Mr. Roosevelt was a senior TSS official from 1953 until he became Chief of TSS in 1959. In his position within TSS, he would have been knowledgeable about the MKULTRA program. He approved some of the funding for George White's San Francisco subproject.

* * *

11. Dr. John Doe. Dr. John Doe was a psychologist on the staff of TSS who had some responsibilities for George White's San Francisco subproject. Dr. Doe cannot be identified by true name because his connection to the Agency remains classified. Dr. Doe would have been able to testify

about his knowledge of George White's activities in San Francisco.

* * *

12. John Gittinger. Mr. Gittinger was a psychologist on the staff of TSS in the 1950's. He visited George White's safehouse in San Francisco on several occasions in the late 1950's and early 1960's.

* * *

13. Frank Laubinger. Mr. Laubinger is a former TSS employee who was tasked in 1077 by then District of Central Intelligence Stansfield Turner to attempt to identify and inform MKULTRA test subjects who may have been given drugs without their knowledge and permission between 1952 and 1963. From 1 March 1979 through 29 September 1979, Mr. Laubinger conducted an investigation to identify unwitting test subjects.

* * *

14. David Rhodes. Mr. Rhodes was a psychologist on the staff of TSS from March 1954 until September 1961. Mr. Rhodes testified before Congress on 20 September 1977 about his one visit in 1959 to a California safehouse set up by George White.

* * *

17. Harry Anslinger. Mr. Anslinger was the Commissioner of Narcotics for the Federal Bureau of Narcotics (FBN) from 1932 until 1962. Mr. Anslinger authorized the detail of George White from FBN to the CIA in 1953 and would be in a position to discuss his knowledge of what Mr. White was doing for the CIA.

* * *

18. Robert V. Lashbrook. Dr. Lashbrook was a biochemist for TSS from August 1951 until June 1963. Dr. Lashbrook testified before Congress on 20 September 1977 about the MKULTRA program.

* * *

I declare under penalty that the foregoing is true and correct. Executed this 4th day of March 2002, in Langley, Virginia.

KATHLEEN A. MCGINN

U.S. Department of Justice
United States Attorney
Southern District of New York

October 21, 1998

Sidney Bender, Esq.
Leventritt Lewittes & Bender

Re: Kronisch v. United States
83 Civ. 2458 (KMW)

Dear Mr. Bender:

I enclose a copy of George White's Diary for 1953.

Very truly yours,
MARY JO WHITE
Unites States Attorney

By:_____
NANCY G. MILBURN
Assistant United States Attorney

October 1979

MEMORANDUM FOR THE RECORD

Subject: Search for Persons Who Were Unwitting Subjects of CIA Drug Research Program-The Investigator's Report

* * *

1. As a result of hearings before the Senate Select Committee on Intelligence and the Subcommittee on Health and Scientific Research on 3 August 1977, CIA was tasked to attempt to identify and inform MKULTRA test subjects who may have been given drugs without their permission between 1952 and 1963.

* * *

Mr. George White, alias Morgan Hall, is believed to have been the key figure in the unwitting testing efforts. These projects were investigated from about 1 March 1979 through 29 September 1979.

* * *

The investigation was not intended to find or identify persons who may have been drugged by others, not to assign blame, but only to identify persons who may have been drugged without their permission and who therefore may have suffered, or may still be suffering, as a consequence thereof.

* * *

4. George White's Diary:

The diary represented a major find; without it there was virtually no hope of finding unwitting test subjects. The Drug Enforcement Administration furnished an investigator to assist in the investigation of the activities of former FBN

personnel. Between 21 and 26 March 1979, the DEA investigator and the undersigned reviewed and photographed pertinent portions of the George White papers which had been donated to the "Foothill Electronics Museum of the Perham Foundation" in Los Altos Hills, California. The papers consisted of diaries...

* * *

The diary suggests that Harry J. Anslinger, deceased, former Commissioner, Federal Bureau of Narcotics, was witting of White's collaboration with CIA from the beginning... On 21 November 1952 it contains an entry, "call Anslinger re CIA, etc."

9. Ira Feldman

Ira Feldman was a close associate of George White and is singled out for discussion because his behavior attracted attention everywhere.

* * *

Virtually without exception, the FBN men interviewed found Feldman secretive and distrusted him. Feldman reportedly had a personal key to the safehouse; the others got access using a key controlled by White. All other agents talked openly with White; Feldman for similar conferences, always closed the door.

CAPTION
McLean, Virginia
Saturday, July 27, 2002
Deposition of

FRANK H. LAUBINGER

A witness, called for examination by counsel for Plaintiff pursuant to notice and agreement of counsel

* * *

42

Q. (Bender) Let's go on to one that's a little clearer. How did you utilize George White's diary to find victims?
A. Reviewed it very, very carefully page by page and as we saw something that we could identify at all, give any clues, we followed them up and tried to make contact

243

Q. After you saw that entry in the George White diary for December 20, 1957, if

244

you found out that a deputy U.S. Marshal who attended that party left the party and thereafter went to his locker, got both of his guns and then proceeded to a bar and held up that bar, would you have investigated that bizarre behavior and that incident?
A. I certainly think we would have.

San Jose Mercury, September 7, 1977 p. 2

Secret CIA diaries surface in Los Altos

By DALE FISHER and CATHY CASTILLO

LOS ALTOS HILLS — He began as a newspaperman in San Francisco and went on to become a narcotics agent, spy and CIA agent with a flair for the exotic and bizarre adventure.

A glimpse into the personal diaries of George Hunter White shows he lived like a storybook spy, dashing from Los Angeles to China, shopping at the Pentagon and visiting prison camps in World War II to [illegible] a multi-millionaire criminal as contacts.

He enjoyed publicity and knew how to keep his name [illegible]. A congressional committee was told he was headed to San Francisco and New York for the CIA under the code name Morgan Hall.

Now a congressional panel is investigating his actions and those of other CIA agents believed to have conducted experiments with mind-altering drugs and brainwashing techniques in the 1950s and 1960s.

George Hunter White died ten years ago in Stinson Beach where he and his wife had lived.

"He was the closest thing to James Bond we had," says a colleague who knew him well.

Two weeks ago the CIA touched off widespread news interest when it notified Stanford University that it might have been linked to CIA-related tests into mind-altering drugs.

While Stanford officials were besieged with queries, White's own

(Back of Section, Col. 1)

BEST AVAILABLE COPY

(Continued from Page 1)

papers, including diaries that covered everyday activities, were sitting ignored in a vault in the Electronics Museum at Foothill College here, just a few miles away.

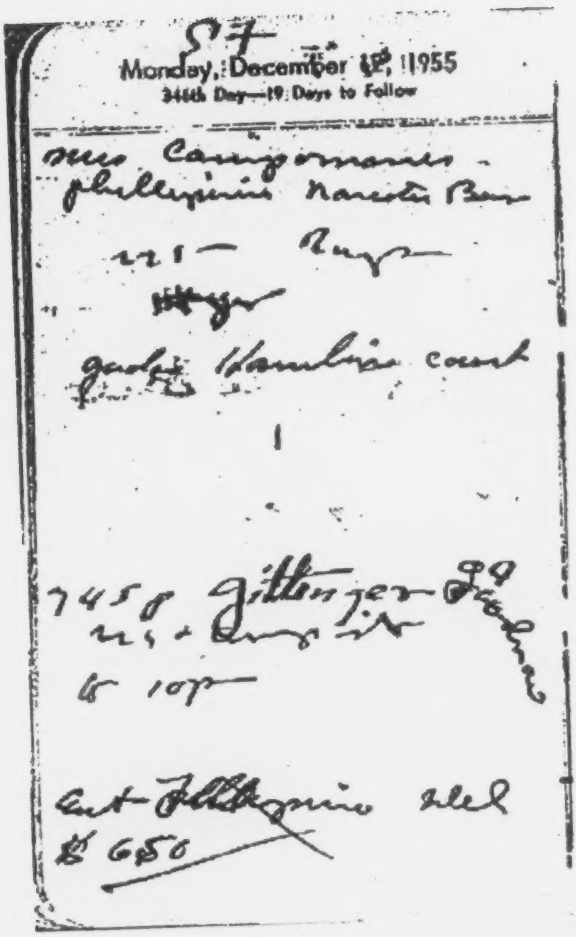
The documents include a large scrap book of press stories detailing White's career as a Federal Narcotics Bureau drug-ring buster and numerous letters and diaries detailing a quarter-century of clandestine activities.

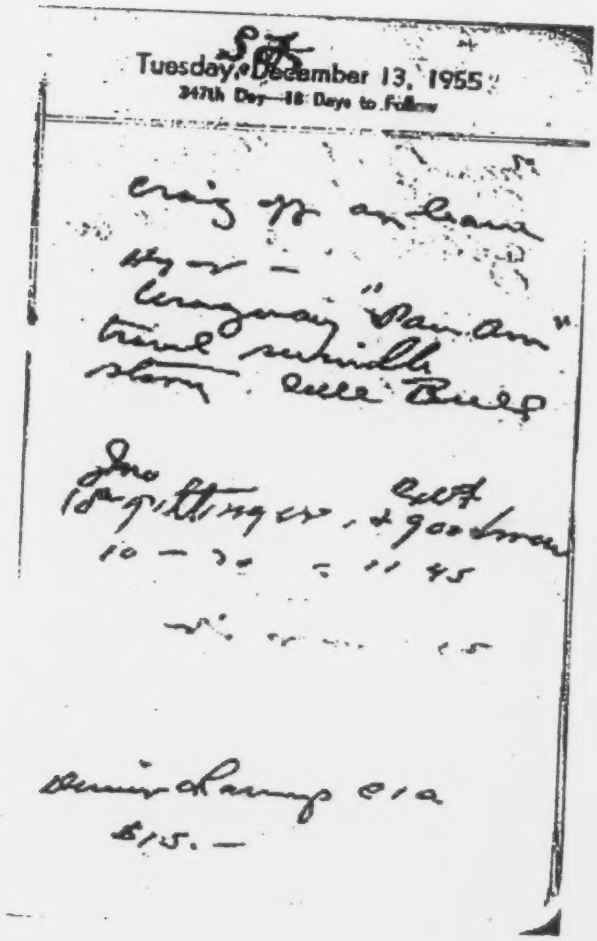
Lee Jones, president of Fargo Co., a San Francisco manufacturer of electronic surveillance equipment, knew White well.

Jones' firm built the kind of bugging devices used at the Chestnut Street apartment in San Francisco where the CIA paid addict prostitutes $100 a day to lure customers and then lace their drinks with experimental drugs.

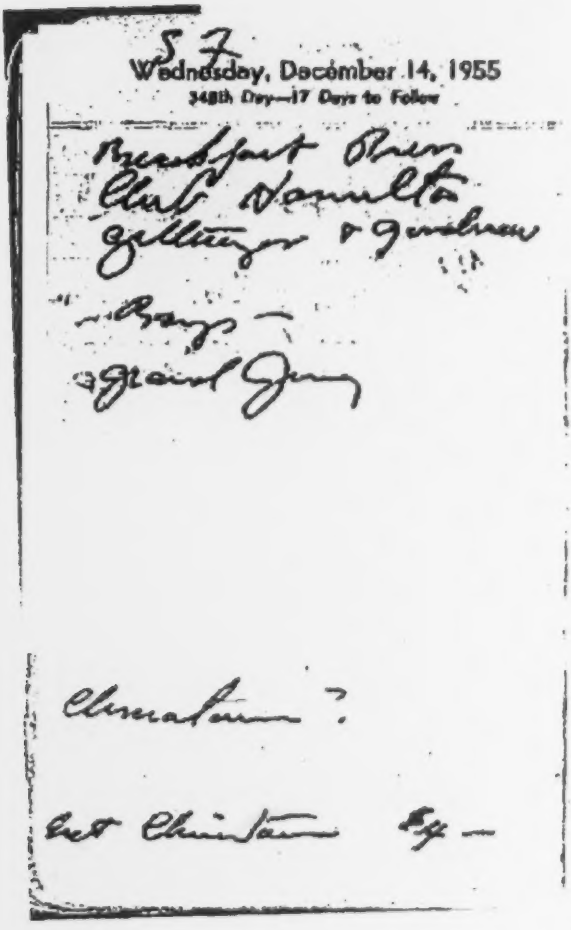
Jones also tipped the press on the collection of White's papers. They had been forwarded to Foothill College to augment a planned display of electronic surveillance equipment at the museum.

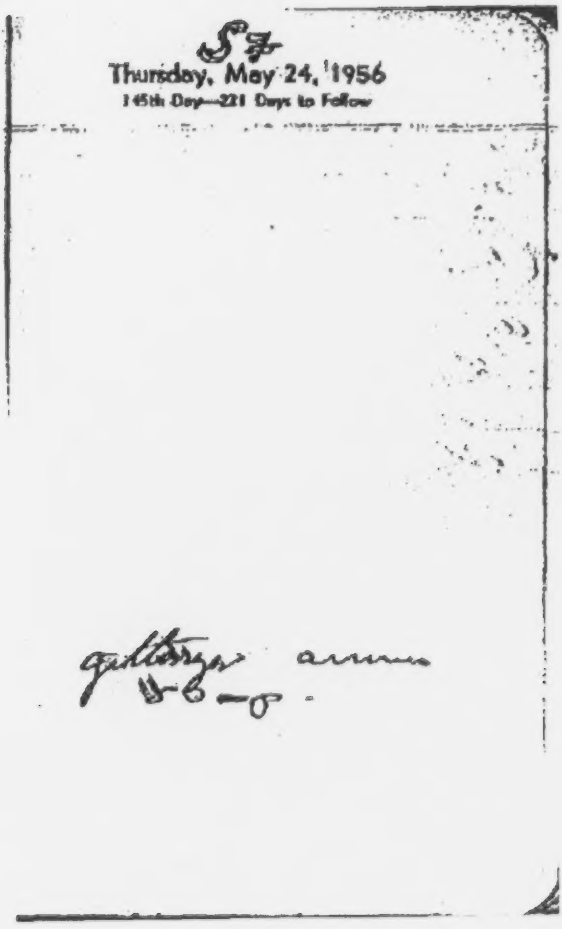
"It's the entire story of his life," Jones said Tuesday of the four boxes of memorabilia. "He went all over the world. He really was James Bond."

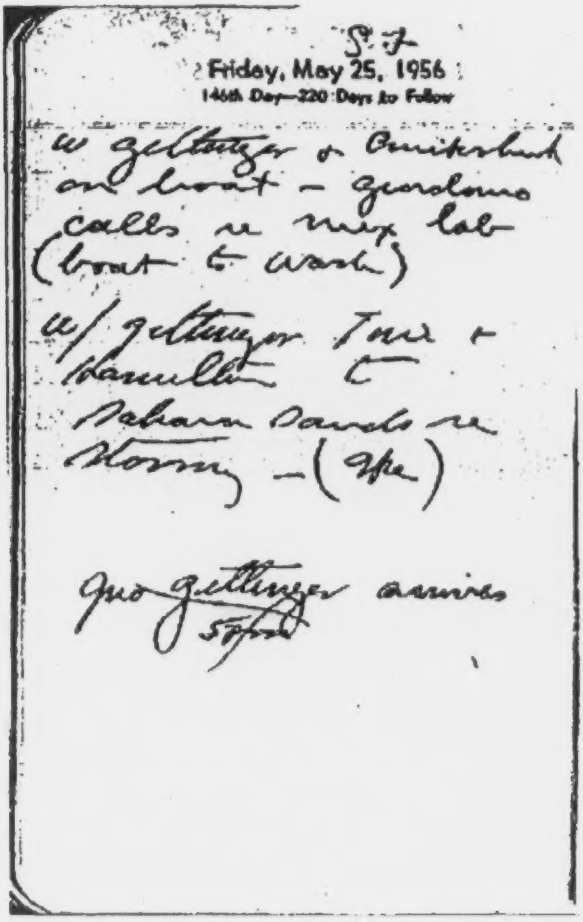

57
Monday, December 12, 1955
344th Day—19 Days to Follow



Tuesday, December 13, 1955
347th Day—18 Days to Follow


57
Wednesday, December 14, 1955
348th Day—17 Days to Follow


Thursday, May 24, 1956
145th Day—221 Days to Follow



S. J.

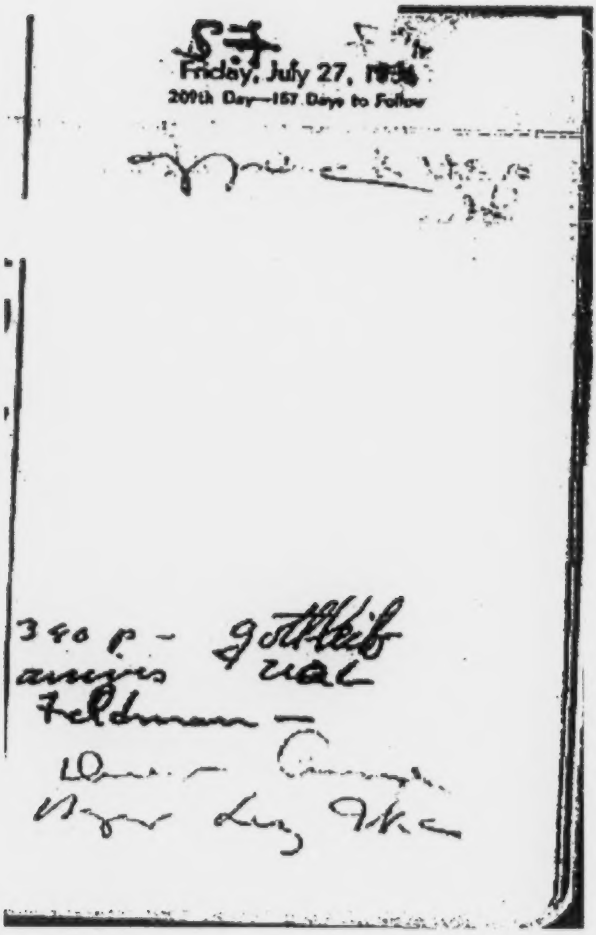
Friday, May 25, 1956

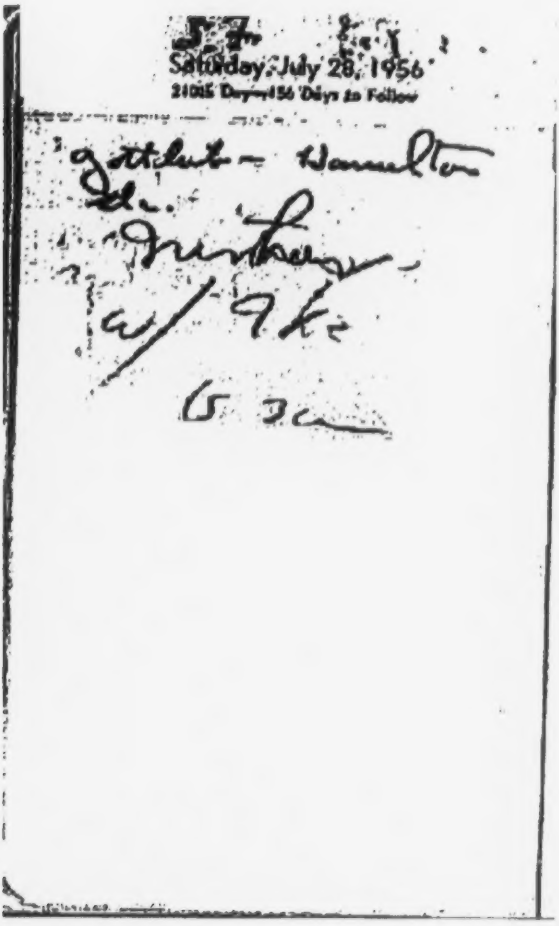
146th Day—220 Days to Follow

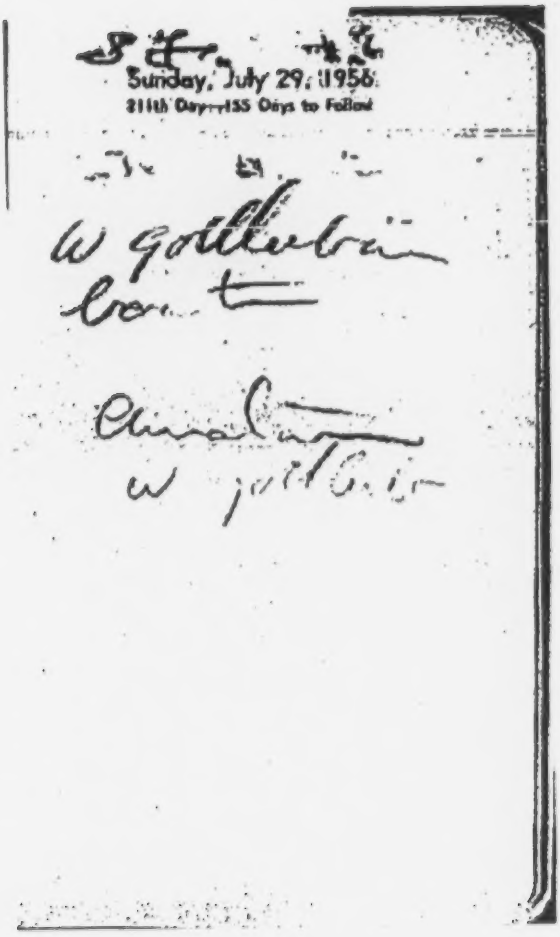
w gettinger & Quisenberry on board — guardsmen calls re mess hall (boat & wash)

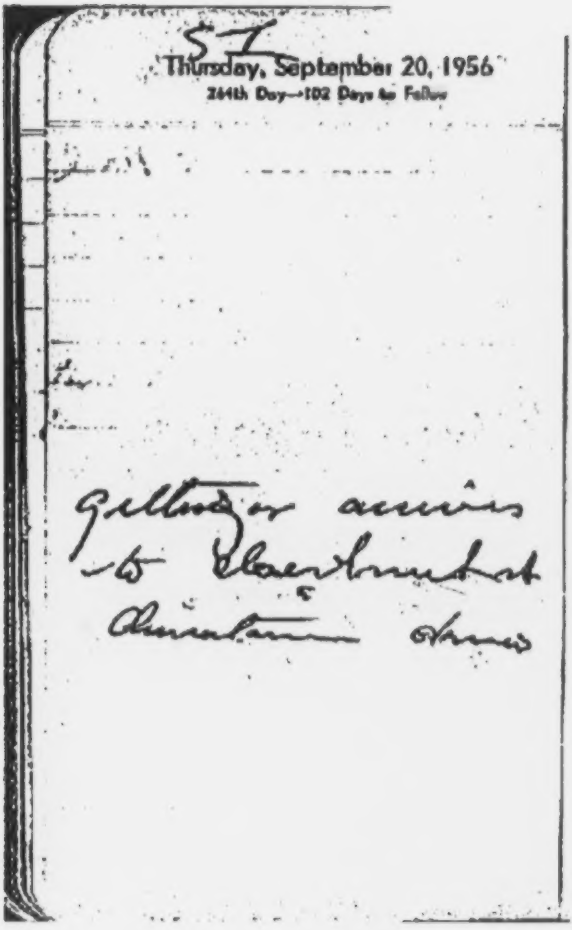
w/ gettinger Tour + Hamilton & Sahara Davis re Stormy — (Ofc)

Geo Gettinger arrives 5 pm

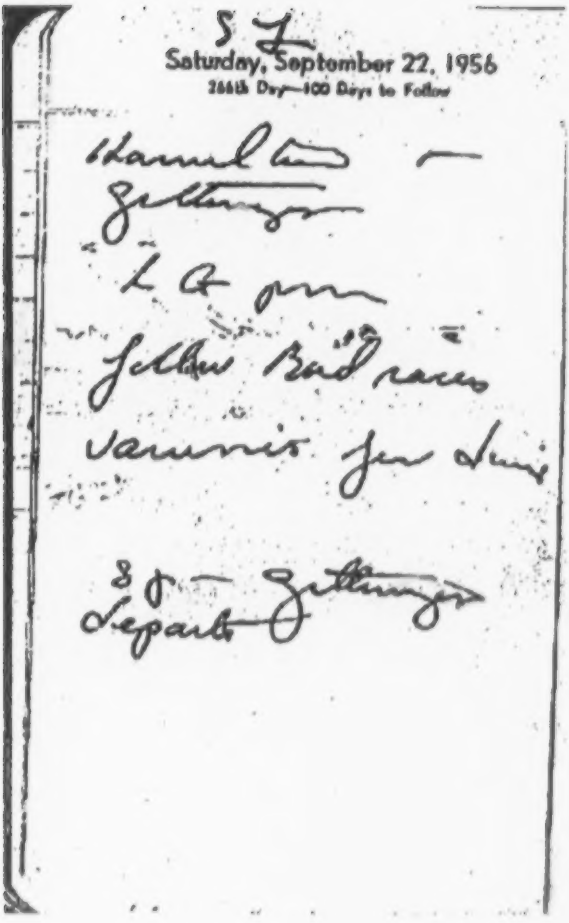

Friday, July 27,
209th Day—157 Days to Follow

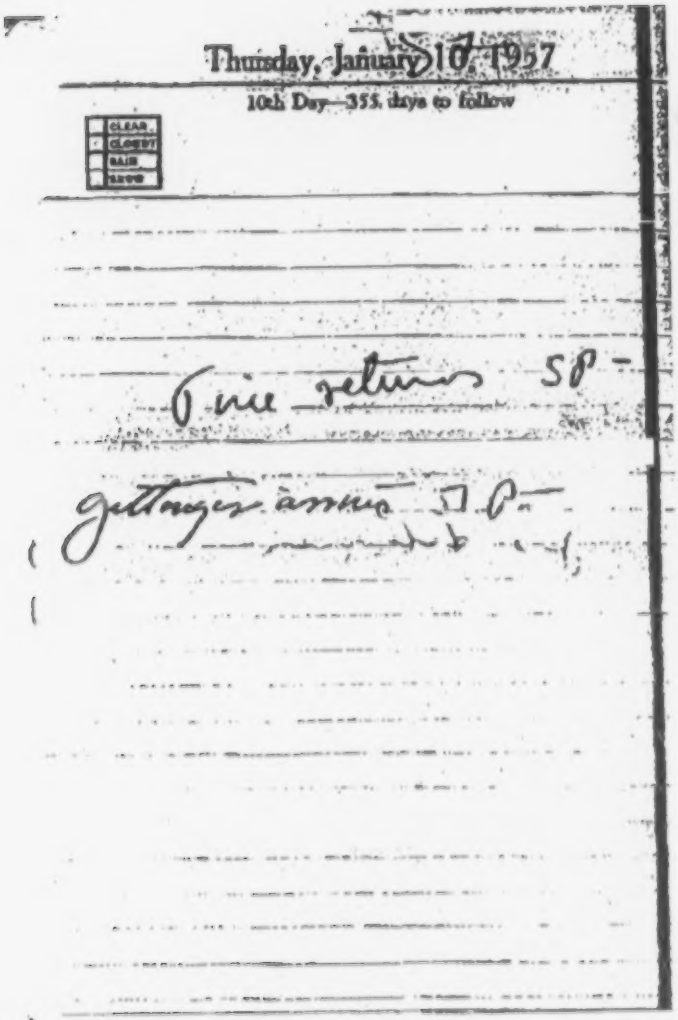

Saturday, July 28, 1956


Sunday, July 29, 1956
211th Day—155 Days to Follow
W Gottlieb
Chas Lamont
W Gottlieb


Thursday, September 20, 1956
264th Day—102 Days to Follow

Friday, September 21, 1956
265th Day—101 Days to Follow


Saturday, September 22, 1956
266th Day—100 Days to Follow

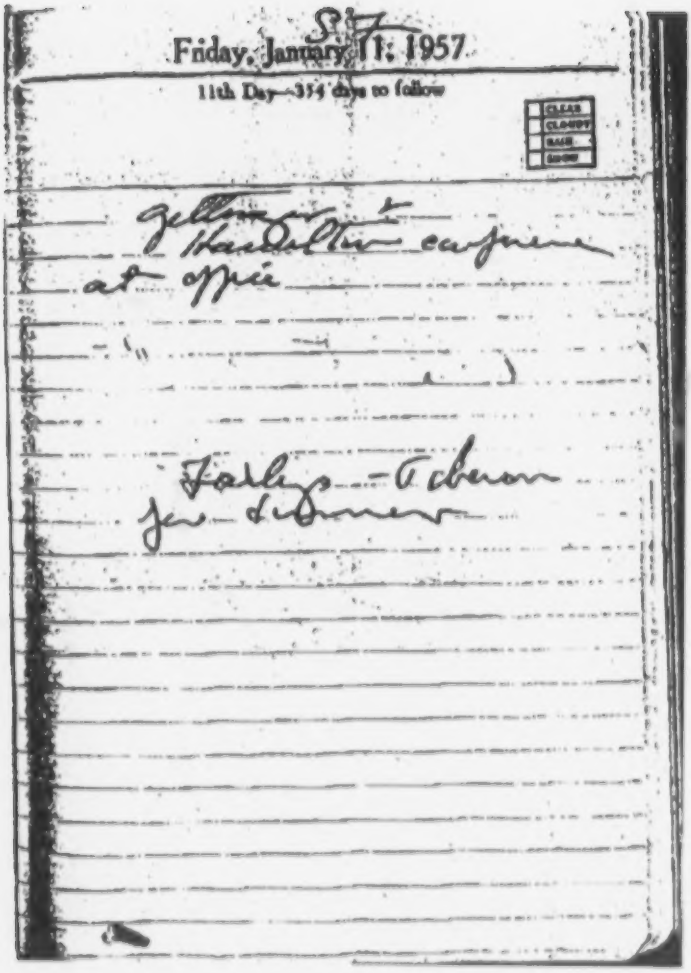

Thursday, January 10, 1957

10th Day—355 days to follow

CLEAR
CLOUDY
RAIN
SNOW

Civil returns 58 -

getting ready to [illegible]

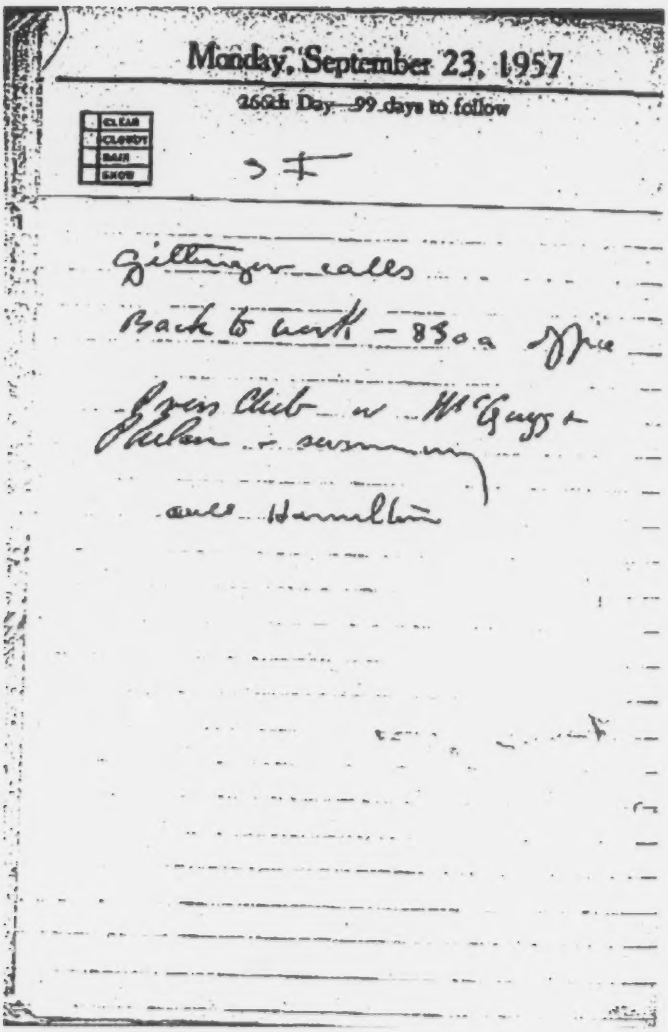

Friday, January 11, 1957

11th Day—354 days to follow

CLEAR
CLOUDY
RAIN
SNOW

Gallon on to
Hartford case
at appeal

Falls - Acheson
for Lebanon



Monday, September 23, 1957

266th Day—99 days to follow

CLEAR
CLOUDY
RAIN
SNOW

Gillingers calls

Back to work – 830 a Mon

Lyons Club w Mr Guys a Parker – swimming

and Hamilton

Wednesday, September 25, 1957

268th Day—97 days to follow

CLEAR
CLOSED
BAG
SHOP

57

talk to US Grand Jury 10:5-11:20
Weakley - Brennan - Wyatt
re Brammer

11:30 Press Club - Hamilton
+ McGuire - for lunch
tell Hamilton about anti-trust
devic (Rep Bonnel)

getting my answer 5:30
w Cl. Jury Rep Memo - amend of NG Wolfe
for dismissal
At news Regular

Get Mr I B English -
re panel Nolle test
today

Get Sol Abrams re
Clinical woman Dr
I want write letter re Nolle pros
suggest he re Gordon for
long contact & last fingers
at least 5-6

Thursday, September 26, 1957

269th Day—96 days to follow

F+

gathings v. Col Gen Mun
Ogden Enterprises et al - Mic

230 - Narcotic Conference

on the stand w gathings et al

Friday, September 27, 1957 57

270th Day—95 days to follow 3 7

Charles Dey Agg
Chg of Jud. Rep, Resist + CP

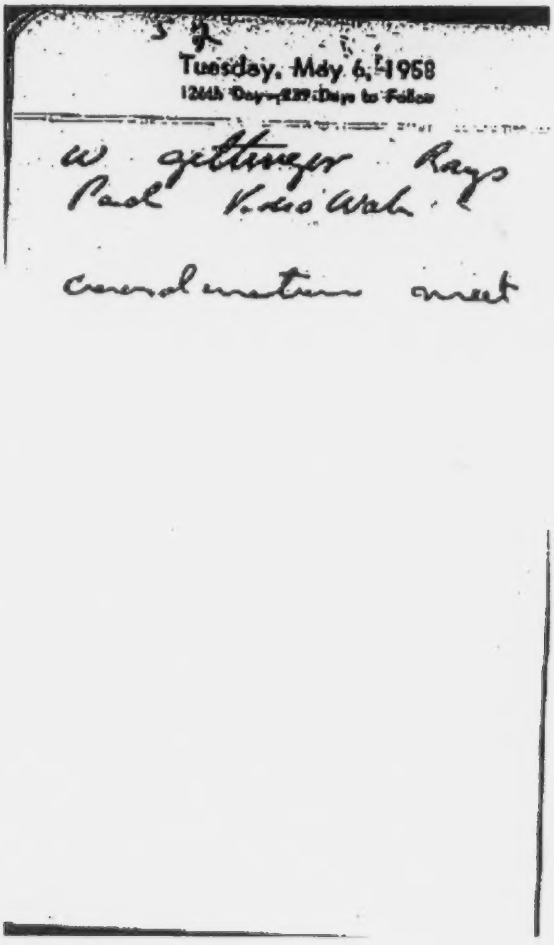
w Mulgannon for Lewis Lumy
Dx = 2
Gillespie + Munro

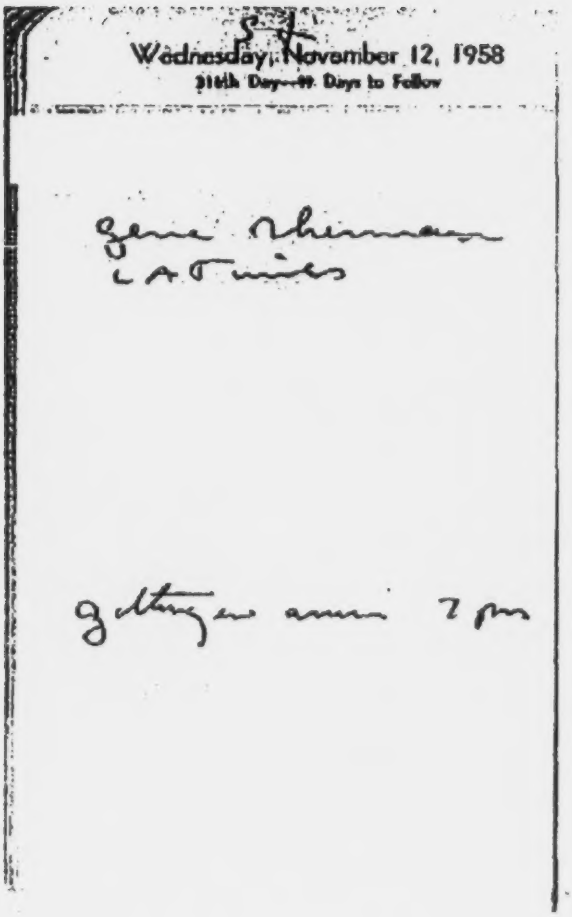
Pat Brown calls re Brannelly
- Take him off Valleio -
Ok return to outboard

Saturday, September 28, 1957

271st Day—94 days to follow

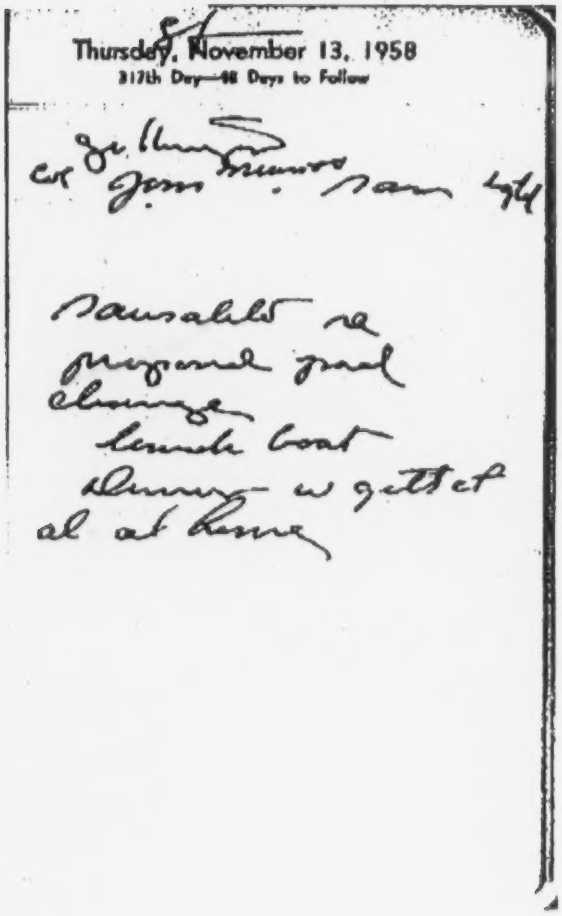
Mr Ayers for dinner
Management for contracts
on land
getting Williams Segment


Tuesday, May 6, 1958
W. gettinger Rays
Paul V. vs Wah.
Conclusion next

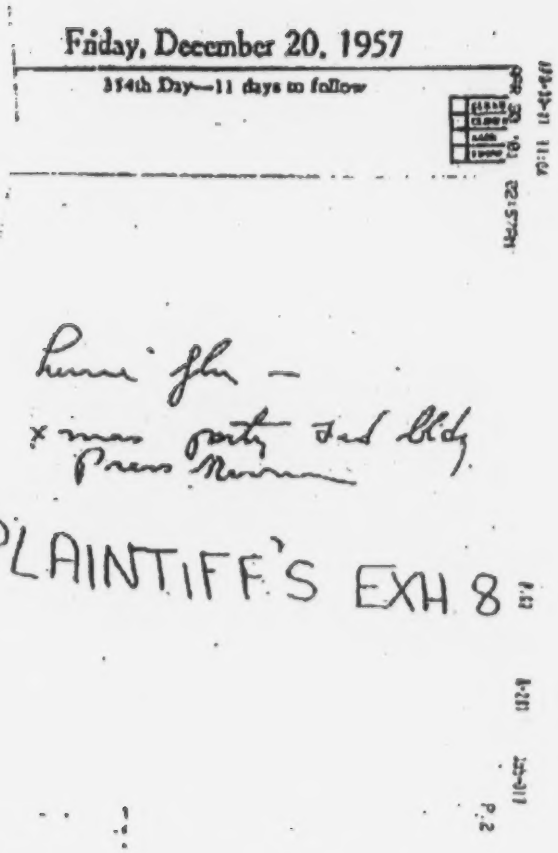

Wednesday, November 12, 1958
311th Day—99 Days to Follow

Gene Sherman
LA Times

Gettysburg ann 7 pm



Thursday, November 13, 1958
317th Day—48 Days to Follow


Friday, December 20, 1957

354th Day—11 days to follow

Lunch - Gov -
x mas party 2nd Bldg
Press Room

PLAINTIFF'S EXH 8

BEST AVAILABLE COPY

STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Federal Tort Claim Act, 28 U.S.C. § 2674, in pertinent part provides:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

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With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

Federal Rule 50(a) of Civil Procedure entitled Judgment as a Matter of Law in Jury Trial...

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense

that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

Federal rule 52 of Civil Procedure entitled Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts hem, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of

law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule."

(c) Judgment on Partial Findings: If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Federal Rule 52(c)'s predecessor, Rule 41(b) provided:

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the*

evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 60. Relief From Judgment or Order

(b) Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Frauds; Etc.

or (6) any other reason justifying relief from the operation of the judgment... This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding... or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.